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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN NATIONAL BANK,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HUNTON & WILLIAMS
Post Office Box 1535
707 East Main Street
Richmond, Virginia 23212
(804) 788-8516

PAUL M. THOMPSON
THOMAS J. MANLEY
GREGORY B. ROBERTSON
HUNTON & WILLIAMS

Counsel for Petitioner

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APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1533

Equal Employment Opportunity Commission,

Appellant,

versus

American National Bank,

Appellee.

No. 79-1725

Equal Employment Opportunity Commision,

Appellant,

versus

American National Bank,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, District Judge.

Argued May 6, 1980. Decided June 26, 1981

Before BUTZNER, RUSSELL and PHILLIPS, Circuit Judges.

William H. Ng, EEOC (Leroy D. Clark, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel, EEOC on brief) for Appellant; Thomas J. Manley (Paul M. Thompson, Jack W. Burtch, Jr., Hunton & Williams on brief) for Appellee.

PHILLIPS, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) instituted this action on a complaint charging that defendant American National Bank (ANB or Bank) had engaged in a pattern or practice of racially discriminatory hiring practices from 1969 to 1975, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The district court found that the static work force statistics submitted by the EEOC revealed a continuous underrepresentation of blacks in defendant's work force during the relevant period, both generally and in the specific job categories of officials and managers and of office and clerical personnel, and therefore constituted prima facie proof of a pattern or practice of discrimination. It then held that prima facie case rebutted, however, at ANB's applicant flow data and a standard deviation analysis of the static work force statistics. The court then examined each of ANB's hiring practices that the EEOC had alleged to be discriminatory, and found them to be legitimate business practices and nondiscriminatory in effect, both separately and in combination. Additionally, the court evaluated 31 claimed examples of discrimination in specific hiring decisions, and found that none showed a denial of employment because of race. Concluding that the EEOC had therefore failed to prove a pattern or practice of discrimination, the court dismissed the suit. It then ruled that the EEOC had brought a frivolous claim and pursued it in bad faith, justifying an award of costs and attorneys' fees to defendant. In a later order, the court determined the amount of reasonable attorneys' fees to be that submitted by ANB, in the amount of $106,084.75.

We agree with the district court's ruling that the EEOC's statistical proof made out a prima facie case of discrimination, but, with the exception of one employment category, we conclude that the court erred in holding that defendant's rebuttal evidence was sufficient to overcome the prima facie case. Because the proof of a pattern or practice of discrimination thus stands unrebutted as to all but the one category on a proper legal analysis of the total

evidence, we reverse and remand for the determination of appropriate relief.

I

This case began with a charge of discrimination filed with the EEOC in 1969 by a rejected black applicant, Sandra Holland. Ms. Holland alleged that she had been refused employment at ANB's Suffolk branch. The EEOC conducted an investigation in 1970, and found that Ms. Holland's application at the Suffolk branch could not be located, though it did find an earlier application at the Portsmouth branch. The EEOC issued its formal "determination" in March 1974, finding reasonable cause to believe that ANB had engaged in discriminatory hiring practices. The determination discussed hiring figures only for ANB's Suffolk branch, and in a footnote rejected information about the hiring of blacks in ANB's Portsmouth branches as "irrelevant to employment at its Suffolk branch." App. 1523. Conciliation efforts were unsuccessful, and Ms. Holland was issued a right-to-sue notice in August 1974, but declined to file suit. The EEOC then insitituted this action in January of 1976, charging a pattern or practice of discrimination in both the Suffolk and Portsmouth branches.

In August of 1976, the district court granted defendant's motion for summary judgment and dismissed the action for laches. This court vacated and remanded the case, in *EEOC* v. *American National Bank*, 574 F.2d 1173 (1978). Applying *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), we held the action not barred because no federal statute of limitations applied to suits by the EEOC once jurisdiction over the complaint is properly obtained, and noted that Congress did not intend state statutes of limitation to apply to such suits. Additionally, we held that the EEOC was entitled to bring suit on the broader pattern or practice allegation, founded on its reasonable cause determination and conciliation efforts. Any prejudice to the Bank resulting from the loss of evidence relating to Sandra Holland's charge did not affect its ability to defend the pattern or practice suit. 574 F.2d at 1175-76.

The case was tried over a four-day period in December 1978. The EEOC presented statistical evidence designed to show gross disparities between ANB's work force and the relevant labor pool of qualified blacks during the period charged. Further evidence was offered to prove ANB's use of subjective selection ciriteria and other discriminatory hiring practices. Finally, the EEOC presented 52 specific instances of black applicants who were allegedly not hired because of their race. (Thirty-one of these testified at trial).

The EEOC's statistical evidence, presented in the form of stipulated exhibits, compared on a static basis the racial composition of ANB's work force in its Suffolk and Portsmouth branches from 1968-75 to that of the general available work force in the relevant market areas.[1] It then compared the racial composition of specific job categories at both branches -- officials

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[1] The EEOC offered two different definitions of the relevant market area; ANB neither challenged the EEOC's approaches nor offered its own definition. The district court found the relevant labor market area for ANB's Portsmouth branches to be the City of Portsmouth and the Norfolk-Portsmouth SMSA; for the Suffolk branches, it defined the relevant area as the city of Suffolk and Nansemond County.

The court used the data set out in Appendix A for general work force comparisons for the years 1968-1975, comparing for each year the number and percentage of blacks employed by ANB with the percentage of blacks in the relevant market area.

The data employed here are of course subject to the general limitation implicit in the term "static." They only depict the work force as it existed on specific days at intervals of a year during the charged period. They do not therefore purport to reflect all employment decisions occurring during those intervals, and may "miss" significant hirings occurring during those intervals.

It is this general limitation rather than any specific inaccuracy in the data here used by the district court that the dissent has pointed up. Slip op. at 93-95. While this limitation can of course give a distorted picture on the ultimate issue of post-Act discrimination, the means for correcting it are provided by the same Supreme Court decisions that authorize use of static work force statistics to make a prima facie case. See generally note 7 *infra*.

and managers, office and clerical workers, and servcie workers -- with the proportion of qualified blacks in the population, for each category.[2] The statistics revealed, as the district court found, that in the Suffolk branches there were no blacks employed as officers or managers during the eight-year period, though blacks comprised 8-10.9% of the qualified labor market. In its twenty clerical positions, ANB-Suffolk employed one black in the years 1970 and 1973, and two in 1971 and 1972. There were no blacks employed in this category during the other relevant years, as compared to a qualified labor market that was 10.3-22.5% black. In the seven ANB-Portsmouth branches, there were no black managers from 1968-1972, and one for each of the remaining three years. The qualified work force during this period was 4.8-6.9% black. In the office and clerical categories at Portsmouth, the Bank's work force was from 0 to 6.5% black from 1968-1974, and 9.3% in 1975, compared with a qualified work force that was 13.9-21.5% black. Only in the service worker category has the percentage of black bank employees been greater than the percentage of blacks in the available service worker force in the relevant labor market area. During the entire period, the service work force in both branches was at least 75%, and often 100% black.

The evidence as to the Bank's hiring procedures[3] was also stipulated by the parties. Applicants had to appear and submit an application form which would be retained on file and considered for vacancies for up to six months. The application form sought information on the individual's education, work experience, skills, references, desired position and salary, and relatives or friends at the Bank. Before 1973, applicants were required to take the Wonderlic Personnel test; until May 1975, a high school

[2] The court used the data set out in Appendix B for special qualifications work force comparisons for the years 1968-1975, comparing for each year the number and percentage of blacks employed by the defendant in Suffolk and Portsmouth in each category with the percentage of qualified blacks in the available work force.

[3] Hiring procedures were similar at the Portsmouth and Suffolk branches.

diploma was required for a clerical position. Application forms would be submitted to a designated employee; usually a different official would screen the applications and conduct interviews when a vacancy occurred. Until 1975, when the Bank began maintaining records for determining compliance with affirmative action plan, no notation was made of the race of an applicant. There may have been clues, however, in their addresses and educational history.

Bank officials testified that when a vacancy developed, they would review the most recent applications first, and usually would not reach applications submitted more than 30 days previously. In a few cases, when they did not find a qualified applicant on file, they would advertise the vacancy. After reviewing applications, officials would select a few applicants to interview. There were no written job descriptions or criteria for hiring. The interviewers, all of whom were white, would evaluate the applicant's ability to communicate, maturity, personality, and physical appearance. The interviewer's decision to accept or reject an applicant was generally controlling. When ANB became particularly interested in hiring an applicant, prior employers were contacted, and character references were sometimes checked. Prior to 1975, ANB occasionlly made retail credit checks on final applicants. Nearly half of the hires during this period had listed friends or relatives among bank employees.

As part of its nonstatistical evidence, the EEOC presented the testimony and written statements of 31 black applicants who had been rejected for positions at ANB. The EEOC stipulated that its case as to individual examples of discrimination would be limited to those 31 applicants who were able to testify. Twenty-one additional applicants were identified by the EEOC as having been discriminated against. Although these particular cases were not submitted to the court on the pattern or practice of discrimination issue, the court considered them in deciding the attorney's fees issue.

The Bank, in rebuttal, submitted applicant flow data purporting to compare the number of blacks and whites hired with those who submitted an application during 1969-1975.[1] These figures revealed that in the Suffolk branches during this time, blacks submitted 25.1% of the applications and represented 17.9% of those hired, while whites submitted 74.9% of the applications and constituted 82.1% of the hires. For the Portsmouth branches, only 1975 data was available. They indicated that blacks constituted 23.3% of the applicants and 11.1% of the hires, while whites were 76.1% of the applicants and 88.9% of the hires. These statistics did not separate the applicants by job category, but combined the service worker hires with the clerical and managerial hires.

Before ruling on the substantive issues under Title VII, the court considered the preliminary issue whether it had jurisdiction to hear the claims. Although finding that the initial charge by Ms. Holland was valid and the EEOC's broader investigation of the general policies and practies of ANB's Suffolk branches relevant to the initial charge, the court concluded that the activities of the Portsmouth branches were not the subject of the EEOC investigation nor were they included in the reasonable cause determination of March 11, 1974. Consequently, the court ruled that it lacked jurisdiction to hear that part of the case concerning the allegedly disciminatory practices and the individual claims of discriminatory hiring at the Portsmouth branches. Anticipating that the case would be appealed, the court nevertheless included the Portsmouth branches in its analysis of the merits.

Addressing the merits, the court first considered the static work force statistics presented by the EEOC, comparing the percentage of blacks in defendant's work force with the percentage of blacks available in the population, using both general work force and special qualifications work force figures. From each set of figures, the court found that blacks were underrepresented in ANB's work force. Under *Hazelwood School District* v. *United*

[1] See Appendix C.

States. 433 U.S. 299 (1977), the court therefore found that the EEOC had presented prima facie proof by statistical means of a pattern or practice of discrmination at ANB's Suffolk and Portsmouth branches.

The court then evaluated ANB's rebuttal evidence consisting of its applicant flow data for the charged period, and the EEOC's nonstatistical evidence related to ANB's screening and hiring practices, and the 31 cases of unsuccessful black applicants who testified at trial. The applicant-flow data and a standard deviation analysis of the static work force statistics were found sufficient in combination to rebut the EEOC's prima facie case. Alternatively, though without discussion, the court found that too few hiring decisions were made to justify an inference of discrimination. After an extensive analysis of each of the hiring practices shown by the EEOC, the court concluded that neither separately nor together were these practices discriminatory but rather served legitimate business purposes. Finally, the court found that none of the 31 unsuccessful black applicants were victims of racial discrimination in hiring. On balance, then, the court concluded that the EEOC's statistical evidence of a prima facie case was substantially rebutted. Conceding that ANB's work force was virtually all white prior to 1969 and racially imbalanced from 1969-1975, the court concluded that the imbalance was a product of pre-1969 activities and therefore not violative of Title VII. For reasons that follow, we find error requiring reversal in the court's legal and factual analysis of the evidence.

II

Initially we consider and reject the district court's conclusion that it had no jurisdiction over that part of the suit concerning ANB's Portsmouth branches.

The 1972 amendments to Title VII gave the EEOC broad enforcement powers. Section 706 enabled the EEOC, after a charge alleging discrimination had been filed with the EEOC and conciliation efforts with the respondent had failed, to bring suit in

its own name. 42 U.S.C. § 2000e-5(f) (1). Although Congress declined to expand the EEOC's powers to the extent exercised by the NLRB, broad litigation powers were added to preexisting powers to enable the EEOC "to vindicate the public interest." *EEOC* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352, 1361 (6th Cir. 1975). Consistent with this expansion of the EEOC's role to include enforcement as well as conciliation, *EEOC* v. *Cleveland Mills Co.*, 502 F.2d 153, 155-56 (4th Cir. 1974); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d at 1357, the 1972 amendments were intended to enable the EEOC to correct "public or 'societal' wrongs, [to be] the public avenger by civil suit of any discrimination uncovered in a valid investigation and subjected to conciliation under the Act." *EEOC* v. *General Electric Co.*, 532 F.2d 359, 373 (4th Cir. 1976). We determined in *General Electric* that the EEOC had standing, after 1972, to bring suit in its own name on "discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act." *Id.* at 366 (italics omitted). In giving the EEOC the right to sue in its own name, Congress signalled its desire "[to eliminate] employment discrimination as a national evil" rather than provide solely for the redress of private interests. To confine standing of the EEOC to that of an individual complaining party would nullify the legislative intent of the 1972 amendments. *Id.* at 373.

The EEOC's new role as an enforcer, however, was not intended to diminish its role as conciliator. Title VII establishes a comprehensive administrative procedure whereby the parties involved, including the EEOC, have the fullest opportunity to resolve charges of discrimination without resorting to the courts. See 42 U.S.C. § 2000e-5(b), (f)(1). Before the EEOC may bring a civil action under Title VII against an employer there must be a charge filed with the EEOC, notice of the charge to the employer, investigation by the EEOC, a determination of reasonable cause,

and an effort at conciliation. *EEOC* v. *Raymond Metal Products Co.*, 385 F. Supp. 907, 916 (D. Md. 1974). *aff'd in relevant part*. 530 F.2d 590 (4th Cir. 1976). Two important purposes are served by this preadjudicative administrative procedure: first, the employer is fully notified of the violation alleged by the charging party; and second, the EEOC has the opportunity to consider all the charges and to attempt their resolution through conciliation and voluntary compliance. *Id.*

The 1972 amendments, while enlarging the powers of the EEOC to include enforcement, retained the previous emphasis on administrative resolution and conciliation of charges. Interpretations of the 1972 amendments emphasize the sequential nature of the process. "[E]ach step in the Commission's administrative process is designed to be a prerequisite to the following step and, ultimately, to suit." *EEOC* v. *E. I. duPont de Nemours & Co.*, 373 F. Supp. 1321, 1336 (D. Del. 1974), *aff'd* 516 F.2d 1297 (3d Cir. 1975). Conciliation, the final step in the process, can therefore be regarded as a condition precedent to the EEOC's power to sue. See *EEOC* v. *Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977), and legislative history of the 1972 amendments quoted therein.

The law on the question of the permissible scope of a complaint filed by the EEOC pursuant to the 1972 amendments has focused on the role of the EEOC as investigator and the statutory preference for administrative resolution of charges of discrimination. Proper investigation and conciliation of charges are characterized as jurisdictional prerequisites to a suit by the EEOC on a particular claim. But see *EEOC* v. *Westvaco Corp.*, 372 F. Supp. 985, 991 (D. Md. 1974) (EEOC's failure to make a timely reasonable cause determination and to attempt conciliation before filing suit goes to whether a claim has been stated rather than to subject matter jurisdiction.)

The district court in this case dismissed the EEOC action insofar as it related to the Portsmouth branches of ANB and the individuals allegedly discriminated against at those branches.

Characterizing the Portsmouth charges as "new discrimination" not included in the original charge by Sandra Holland, the court analyzed whether or not these charges could be included in the EEOC civil complaint under the test set forth in *General Electric*. Finding that the EEOC investigation and reasonable cause determination concerned only the allegations of discrimination at the Suffolk branches, the court concluded it was without jurisdiction to hear the Portsmouth charges.

We disagree with the district court's analysis and conclusion on this issue. The question was not whether the court had jurisdiction over "new" charges of discrimination brought for the first time by the EEOC in its civil complaint. The crucial issue was instead whether the district court had jurisdiction over the same charges of discrimination against a single defendant, expanded to include the same practices at all its branch offices when the original charge and investigation focused on one city but where there was common ownership and control over branches in both that city and a nearby city, and where the challenged hiring practices for all branches were similar. We conclude that jurisdiction over charges pertaining to all branches of ANB was proper in this case because there was, through the EEOC's investigation and attempted conciliation with regard to Suffolk, adequate notice to the defendant of the practices under investigation and ample opportunity for conciliation concerning those practices. Had the conciliation effort been successful, given the common control over and similar practices at the two cities' branches, whatever changes were to be instituted at the Suffolk branches would no doubt logically and necessarily have been made at the Portsmouth branches as well.

Our resolution of this issue does not disturb the rule announced in *General Electric* and since adhered to by this court. See *EEOC* v. *Chesapeake & Ohio Ry.*, 577 F.2d 229, 231-32 (4th Cir. 1978). As we noted above, completion of the full administrative process is a prerequisite to the EEOC's power to bring suit in its own name. This power of enforcement is bottomed on an administrative

scheme giving every employer charged with discrimination under Title VII the opportunity to correct its fault out of court. See *Macon* v. *Bailar*, 451 F. Supp. 140, 142 (E.D. Va. 1978), citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Consistent with this scheme, we require that particular charge of discrimination be the subject of the reasonable cause determination and conciliation before being subject to suit by the EEOC. This requirement, for example, protects an employer charged in the reasonable cause determination with race discrimination in hiring against being surprised by a subsequent suit including charges of race discrimination in layoffs or promotion, or sex discrimination. There would have been no prior notice to the employer that practices relating to these charges were suspect nor an opportunity for the employer to remedy the problems out of court.

This case, however, does not present such a situation. There is but a single charge of race discrimination in hiring. ANB is a single employer with operations at multiple locations, all subject to unified supervision and control and using similar hiring practices. 21 F.E.P. Cases at 1541. But *cf. Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980) (importance of local autonomy and discrete labor pools in adjudicating liability); *Hill* v. *Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979) (same). Although the notice of the original charge by Sandra Holland was sent to Donald King, Assistant Vice President of ANB Suffolk, the receipt of the notice was acknowledged by Joseph M. Fail, Vice President at the main office in Portsmouth. App. 1518, 1519. Also, the EEOC's notice of failure of the conciliation effort was sent to ANB's attorney, *id.* at 1526, who presumably represented not only the Suffolk branches but the entire organization. ANB's officers must therefore be charged with full awareness of the charges and the issues to be resolved in conciliation and thus fully aware of the practices challenged by the EEOC.[3] There was therefore no possibility for prejudicial surprise of the sort that has properly been held to preclude proof of later added charges in other situations.

We conclude, therefore, that the district court did have jurisdiction over the Portsmouth claims and should have considered proof related to them.

III

We turn now to the district court's analysis on the merits. As indicated in our general summary of the course of proceedings, the district court specifically concluded that, based upon the static work force statistical evidence, there was prima facie proof of a pattern or practice of race discrimination in hiring:

> [T]he fact [is] that from 1969 to 1975, blacks were underrepresented in defendant's work force, not only in the work force generally but also in the specific categories of

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[5] The situation is similar to one that occasionally occurs in the private suit where the plaintiff names a defendant not named in the original charge filed with the EEOC. The general rule is that "[i]t is a jurisdictional prerequisite to the filing of a suit under Title VII that a charge be filed with the EEOC against the party sought to be sued." *Bouve* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); see *Stith* v. *Manor Baking Co.*, 418 F. Supp. 150, 155-56 (W.D. Mo. 1976), and cases cited therein. The rationale for the rule is like that behind the rule that the claims in a EEOC enforcement suit must have been included in the reasonable cause determination and subject to conciliation. The defendant, if he has been named in the original charge, has been notified of the asserted Title VII violation. Further, the charged party is thus brought before the EEOC, "[permitting] effectuation of the Act's primary goal, the securing of voluntary compliance with the law." *Bouve* v. *Colgate-Palmolive Co.*, 416 F.2d at 719. Courts have developed exceptions to this rule, though, where it is clear that the defendant through some relationship with the named respondent had notice of the charges and participated in the conciliation process. See, *e.g.*, *Stith* v. *Manor Baking Co.*, 418 F. Supp. at 156, and cases cited therein; *Escamilla* v. *Mosher Steel Co.*, 386 F. Supp. 101, 105 (S.D. Tex. 1975) (jurisdiction proper over parent of wholly-owned subsidiary where parent had or should have had notice of conciliation process); *Chastang* v. *Flynn & Emrich Co.*, 365 F. Supp. 957, 964 (D. Md. 1973) ("where there is substantial, if not complete identity of parties before the EEOC and the court, it would require an unnecessarily technical and restrictive reading of [the statue]" to deny jurisdiction), *aff'd in relevant part*, 541 F.2d 1040 (4th Cir. 1976).

> officials and managers and office and clerical personnel. The Court cannot agree with defendant that these comparisons are "irrelevant." *Hazelwood School District* v. *United States*. 433 U.S. 299, 15 F.E.P. Cases 1 (1977), held that comparative statistics showing gross statistical disparities are prima facie proof of a pattern or practice of discrimination. *Id.* at 308-09. The Court finds, therefore, that the statistical evidence presented here by the EEOC is prima facie statistical proof of a pattern or practice of discrimination.

21 F.E.P. Cases at 1552 (footnote omitted). The court then concluded, however, after analyzing the defendant's applicant flow data and applying a standard deviation analysis to both the static work force statistics and the applicant flow data, that the inference of a pattern or practice of race discrimination had been neutralized. *Id.* at 1560. Having thus concluded that the statistically based prima facie case had been effectively rebutted, the court then turned to independent consideration of the EEOC's nonstatistical evidence offered to show a discriminatory pattern or practice. Concluding that this evidence would not support an inference of discrimination, the court was led inexorably to the ultimate conclusion that the EEOC had failed to carry its burden of proof. 21 F.E.P. Cases at 1584.

For reasons that follow, we conclude that in a number of critical respects the district court's analysis of the evidence was flawed by specific failures correctly to apprehend or to apply controlling legal principles developed by the Supreme Court for analyzing the evidence in this type case. These misapprehensions and misapplications constituted errors of law which invalidate with one exception the court's ultimate conclusion that the EEOC failed to prove the pattern or practice of discrimination as charged and properly under consideration. We further conclude that under a legally correct analysis of the essentially undisputed historical facts in evidence, a prima facie case was established and except

with respect to managerial employees in the Suffolk branches not rebutted or avoided, and that in consequence a pattern or practice of racial discrimination in hiring was proved.

Specifically we find errors of law in the weight apparently assigned by the court to a standard deviation analysis of certain of the statistical evidence; in the significance which the court assigned to ANB's applicant flow statistics as rebutting evidence; and in the way in which the court treated the relationship between the statistical and nonstatistical evidence offered to prove the discriminatory pattern or practice charged. To show why, we briefly summarize the controlling principles for analysis of proof in this case, and then indicate wherein we think the district court so far misapprehended or misapplied these as to make erroneous its ultimate conclusion that the EEOC had failed to prove a pattern or practice of discrimination violative of Title VII.

The controlling principles are those embodied in the proof scheme developed by the Supreme Court for assessing claims of patterns or practices of disparate treatment, principally in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977) and *Hazelwood*. While designed merely to provide a "sensible, orderly way to evaluate the evidence," *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577 (1978), and not intended as an inflexible, rigid framework for all cases, *id.* at 575, 577, the basic design of this proof scheme is perfectly and appropriately adaptable to the evidence presented in the instant case.

In the type case we consider, the ultimate issue is whether an employer regularly and purposefully treats or has treated blacks less favorably than whites and whether this disparate treatment is racially motivated. *Teamsters*, 431 U. S. at 335. The EEOC of course bears the initial burden of making out a prima facie case of discrimination. This prima facie showing may in a proper case be made out by statistics alone, *Teamsters*, 431 U. S. at 339; *Hazelwood*, 433 U. S. at 307-08; *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975), or by a cumulation of evidence,

including statistics, patterns, practices, general policies, or specific instances of discrimination. See *Barnett* v. *W. T. Grant Co.*, 518 F.2d at 549; *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972). If the prima facie case is established by the EEOC's statistical evidence, the employer may nevertheless rebut it, dispelling the inference of a general policy of discrimination, by "demonstrating that the Government's proof is either inaccurate or insignificant." *Teamsters*, 431 U. S. at 360. One way that static work force statistics revealing gross disparities can be shown nevertheless to be "insignificant" is by showing that the disparities are mainly attributable to pre-Act rather than to post-Act employment actions. This may be done in two basic ways: by focusing on the static work force statistics and purging them of all pre-Act employment actions so that only post-Act actions remain for assessment; or, more commonly, by focusing on post-Act employment decisions, and showing either that considered alone, they affirmatively reveal nondiscrimination in the post-Act period or that they are insufficient in number to support an ultimate conclusion of a post-Act discriminatory pattern or practice.[6] *Hazelwood*, 433 U. S. at 309, 313.

In the instant case, the EEOC sought within this scheme of proof to make out a prima facie case by a combination of static work force statistical evidence covering the charge period, evidence of specific hiring practices followed by ANB during that period, and evidence of specific instances of individual discriminatory actions during the period. In attempted rebuttal of the statistical evidence, ANB sought to establish its "insignificance," rather than its "inaccuracy" in any computational or objective fact sense. Its chosen means of showing probative insignificance was two-fold: by subjecting it to a

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[6] The district court apparently concluded alternatively that, applying this principle, ANB's hiring decisions during the relevant period, as revealed in its application flow data, were too few in number (39 in Suffolk from 1968 to 1975 and 27 in Portsmouth in 1975) to justify an inference of discrimination. 21 F.E.P. Cases at 1556.

standard deviation analysis, to reveal its weakness as proof of a regular operating policy of purposeful discrimination; and by showing, through applicant flow statistical data, that its post-Act decisions were manifestly nondiscriminatory when considered in relation to its hiring opportunities during that period, particularly when subjected to a standard deviation analysis.

It is with respect to the evidence offered by the parties to support these positions that the district judge committed the specific legal errors of analysis that we now address.

First off, the court's analysis reveals a basic misapprehension of the relationship between statistical and nonstatistical evidence offered to establish a prima facie case, of the relationship between these and evidence tending to rebut any prima facie case established, and of the appropriate mode of analysis under the disparate treatment proof scheme. This appears in the following way.

Although the court concluded that the EEOC had proved a prima facie case of a pattern of racial discrimination in hiring by ANB between 1969 and 1975, 21 F.E.P. Cases at 1552, it then found that "[t]he available hiring statistics, [a standard deviation] analysis, the evidence concerning the hiring practices of defendant, and the 31 cases of unsuccessful black applicants who testified at trial substantially outweigh and refute the EEOC's statistical evidence." 21 F.E.P. Cases at 1584. At this point the court moved on to an independent evaluation of the EEOC's nonstatistical evidence, finding no suggestion of discrimination in either the hiring practices or in the individual claims of discrimination. In this manner the EEOC's nonstatistical and statistical evidence were required independently to show discrimination sufficient to establish a prima facie case.

While, as indicated, the suggested disparate treatment proof scheme is not ironclad and rigid, the mode of analysis used by the district court so completely skews its substantive underpinnings that the resulting conclusion of a failure of proof is simply not supportable. Under a proper analysis, all of the evidence,

statistical and nonstatistical, tending to establish a prima facie case should first have been assessed on a cumulative basis. If that assessment showed a prima facie case made out, inquiry should then have turned to whether, by any of the suggested means, the prima facie case -- the inference of discrimination -- had been effectively dispelled. Under such an analysis, and with the statistical data correctly assessed, we conclude, for reasons that follow, that on the evidence before the district court, the EEOC with one exception did prove a pattern or practice of discrimination in the respects charged.

A.

We commence in agreement with the district court's specific conclusion that looking alone to the EEOC's static work force statistics[7], a prima facie case of discriminatory hiring patterns or practices was made out. As frequently observed by the Supreme Court, and as recognized by the district court, gross statistical disparities in the static work force during the relevant period may alone constitute prima facie proof of the discriminatory practice. *Hazelwood*, 433 U. S. at 307-08; see *Teamsters*, 431 U. S. at 335 n.15, 339 n.20; *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265-66 (1976). The evidence supporting this fundamental, threshold conclusion by the district

[7] Section 703(j) of Title VII "imposes no requirement that a work force mirror the general population." *Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977). Employment discrimination is seldom overt, however, and courts must look to evidence other than specific acts of discrimination to determine whether discrimination exists. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972). Static work force statistics showing a racial imbalance are probative in these cases not because the imbalance shown is in itself violative of Title VII, but because "such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant. . . ." *Teamsters*, 431 U.S. at 339 n.20.

court bears emphasis at this point in view of that court's subsequent conclusion that its inferential force was completely dispelled by other evidence.

The statistical data in respect of officers and managers, using qualified labor pool figures,* showed that in Suffolk there were no black officials or managers during any of the years in question,* while the available work force was 8.0-10.9% black. In the office and clerical workers category, during three of the charge years (1969, 1974, 1975) there were no blacks employed in Suffolk in these categories. In two years (1970, 1973), there was one black, and in two years (1971, 1972) there were two. When two blacks were employed, the percentage (10.0-11.1%) is equivalent to the percentage of blacks available in Suffolk (10.3%) but far short of the percentage in Nansemond County (22.5%). Further, for five of seven years, 100% of the service workers in Suffolk were black, compared with 44.8-58.1% in the available work force.

The Portsmouth figures are equally compelling. For four of seven years there were no black officials and managers; for the remaining three years there was one black employed in that category (2.7-2.8%). The percentage of blacks in the available work force was 4.8-6.9%. In the office and clerical workers category, the percentage of blacks ranged from 0.0-6.5% for six of the years, with a high of 9.3% in 1975, while the available work force was 13.9-21.5% black. As in Suffolk, the service workers

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* The district court analyzed, as well, general work force figures. See Appendix A. We recognize that in *EEOC* v. *United Virginia Bank/Seaboard National*, 615 F.2d 147, 150 (4th Cir. 1980), we upheld under Fed. R. Civ. P. 52(a) a finding by the district court that general labor force statistics were not an appropriate statistical group for comparison with bank employees. Without further analysis we here rely only on the specialized work force figures, which clearly support an inference that race was a factor in hiring. See Appendix B for this data.

* The district court included 1968 in its charts, but the charge years included only 1969-1975. The practices apparent in 1968 are consistent with the pattern in later years. Even so, in finding an inference of discrimination we have considered only 1969-1975.

were 80.0-100.0% black while the available work force was only 45.3-59.2% black.

These statistical disparities are substantial, in some cases reaching the "inexorable zero" point. *Teamsters*, 431 U. S. at 342 n.23. They show that blacks were consistently underrepresented in the office and clerical categories in branches in both cities and unrepresented in the officials and managers categories in Suffolk for all years and Portsmouth for four of seven years. The district court's conclusion that, considered alone, they establish a prima facie case is firmly supported by the record.

We turn now in detail to the process of analysis by which, starting from this point, the district court ultimately determined that this prima facie statistical case was defeated. One neutralizing factor for the district court was the perceived effect of a standard deviation analysis[10] upon this static work force statistical data. In the officer/manager category the court found that the standard deviations always remained less than two, and in the office and clerical employees category, the standard deviations were always less than three for Suffolk and almost always more than three for Portsmouth. This analysis, according to the district court, neutralized the prima facie statistical case in all but the office and clerical workers category for Portsmouth.

We disagree with this conclusion derived by the district court from its standard deviation analysis -- for reasons that we think important to spell out. The conclusion was based upon an apparent assumption that if standard deviations reflected in static work force statistics were not "more than two or three" the disparities were necessarily shown to be statistically insignificant. 21 F.E.P. Cases at 1558-59. This assumption is simply incorrect -- for reasons we think it important to develop in order to guard against misuse of this method of analyzing statistical proof and to emphasize its limitations when used by courts in this type case.

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[10] The district court applied the standard deviation analysis to the specialized work force figures, recording generalized values for the number of standard deviations revealed, as follows: (Continued on next page)

(fn. 10 continued)

NUMBER OF STANDARD DEVIATIONS

Official-Managerial Employees

	Suffolk Branches		Portsmouth Branches	
	Suffolk (8.0%)	Nansemond (10.9%)	Portsmouth (6.9%)	Norfolk - Portsmouth SMSA (4.8%)
1968	0-1	0-1	1-2	1-2
1969	0-1	0-1	1-2	1-2
1970	0-1	0-1	1-2	1-2
1971	0-1	0-1	1-2	1-2
1972	0-1	0-1	1-2	1-2
1973	0-1	0-1	1-2	0-1
1974	0-1	0-1	1-2	0-1
1975	0-1	0-1	1-2	0-1

Office and Clerical Employees

	Suffolk Branches		Portsmouth Branches	
	Suffolk (10.3%)	Nansemond (22.5%)	Portsmouth (21.5%)	Norfolk - Portsmouth SMSA (13.9%)
1968	1-2	2-3	4-5	3-4
1969	1-2	2-3	5-6	4-5
1970	0-1	1-2	4-5	3-4
1971	0-1	1-2	4-5	2-3
1972	0-1	1-2	4-5	2-3
1973	0-1	1-2	4-5	2-3
1974	1-2	2-3	4-5	2-3
1975	1-2	1-2	3-4	1-2

This district court's assumption was presumably drawn from general observations made by the Supreme Court in the course of footnote discussions of standard deviation analysis as a means of testing statistical proof in *Castaneda* v. *Partida*, 430 U. S. 482, 496 n. 17 (1977) and again in *Hazelwood*, 433 U. S. at 311 n. 17. As briefly explained and applied in those opinions, standard deviation analysis may perform some legitimate service for courts in assessing the statistical significance of data offered to establish *(Castaneda)* or rebut *(Hazelwood)* a charge of discrimination in composing juries *(Castaneda)* or work forces *(Hazelwood)*. Simply put, it tests the hypothesis that underrepresentation of a protected minority group in any sample made up of a protected and a nonprotected group (binomial distribution) might be attributable to normal fluctuations of chance rather than to discriminatory design. The "standard deviation" is the measure of the predictable fluctuation in a random selection process. The difference between actual ("observed") numbers of the protected group in such a sample and the number that would be "expected" in a perfectly proportional process of selection from the appropriate pool can then be expressed in numbers of standard deviations. In turn, standard deviations can be expressed in terms of the mathematical probability that chance is the cause of the disparities (differences between "observed numbers and expected values") measured. As standard deviations increase numerically, the probability of chance as the cause of revealed underrepresentation of course diminishes. To the extent the probability of chance is shown to be quite small, the legal inference of discrimination based upon a rough legal assessment that disparities are manifestly "gross" or "substantial" is thus "scientifically" confirmed.

It was against this general background that the Supreme Court in *Castaneda* noted that "[a]s a general rule . . . , if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [selection process] was random would be suspect to a social scientist." 430 U. S. at 497 n. 17. The Court then pointed out that

the standard deviations revealed in the data before it were so far beyond this "suspect" range -- 29 for one sample, 12 for another -- that the probability of chance as the explanation was simply infinitesimal: in the convenient mathematical short-forms -- 1 in 10^{130} and 1 in 10^{25}, respectively. In this context, it is obvious that the Court was merely emphasizing the lack of any theoretical possibility that chance rather than discriminatory design underlay the underrepresentation it was considering.

If a legal rule of analysis can properly be derived from the *Castaneda* footnote, it can only be that standard deviations greater than two or three necessarily exclude chance as a cause of underrepresentation. The converse of this -- that standard deviations of not "more than two or three" necessarily exclude discriminatory design as the cause -- is nowhere implied. Nor could it be, as we shall now attempt to show.

The *Castaneda* Court had no need to explore the levels of probability that exist in the range of "two or three" standard deviations, being content to note that beyond this range social scientists would find "suspect" for scientific purposes the hypothesis of random choice. When this range is explored, however, it appears that well short of three standard deviations the probability levels for chance as explanation have already dropped far below the point at which courts of law -- concerned with proof by the "greater weight" or "preponderance" of the evidence -- would presumably have discarded the hypothesis of chance. Just short of two standard deviations -- specifically at 1.96 -- the probability of chance is only 5 in 100; at just over two and one half, it is only 1 in 100; by three it is less than 1 in 100. W. Hays & R. Winkler, Statistics: Probability, Inference and Decision 218-19, 381-82 (1971). For this reason, authority can be found for the proposition that most social scientists, applying laboratory rigor to rule out chance as even a theoretical possibility rather than the law's rougher gauge of the "preponderance of the evidence," are prepared to discard chance as a hypothesis when its probability level is no more than 5%, *i.e.* at approximately two standard deviations. *Id.* at 394.

From all this we conclude that courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three. Above this range, with standard deviations of more than three, the analysis may perhaps safely be used absolutely to exclude chance as a hypothesis, hence absolutely to confirm the legitimacy of an inference of discrimination based upon judicial appraisals that disparities are, to the legally trained eye, "gross." This we conclude is all that the Supreme Court has ever directly approved by its own use of the process.[11] Within the range of one to three standard deviations, where the probability of chance as explanation for revealed underrepresentation declines precipitately from only 5% at two standard deviations to less than 1% at three, we do not see how a court can properly find the only other hypothesis -- discrimination -- dispelled by this analysis alone. On this basis, we conclude that the district court's analysis revealing standard deviations which, as applied to the aggregate of years and work categories involved, lay preponderately within or above this range, could not properly be taken as dispelling the inference of discrimination based upon the disparities in the static work force data. To the extent this was

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[11] In *Hazelwood* the Court used a standard deviation analysis to emphasize the importance of choosing the right labor pool from which to derive base data for showing statistical disparities. The Court was careful to emphasize that this was the sole purpose and that its "observations were not intended to suggest that precise calculations of statistical significance are necessary in employing statistical proof. . . ." 433 U.S. at 311 n.17. Noting, in paraphrase of the above-cited passage from *Castenada*, that "a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race," *id*, the Court then proceeded to point out that depending upon which of two possible labor pools were chosen, the standard deviations could range from less than one to more than six. Significantly, the only direct consequence for proof assessment noted by the Court was that standard deviations of more than two or three would "undercut" the hypothesis of random selection. To the extent there is any implication that the low-side deviations might rebut, it may be significant that they were all less than two.

the basis of the district court's finding, we conclude that it was clearly erroneous.[12]

B.

We turn now to the district court's assessment of the defendant's applicant flow data[13] offered to rebut the prima facie case of discrimination made out by the static work force statistics. ANB contends that it does so in two approved ways: first, by affirmatively showing that ANB's hiring decisions during the charge periods were not discriminatory; alternatively by demonstrating that the total number of hiring decisions during the period were so few in total number that, without regard to their substance, they could not support any conclusion of a discriminatory pattern or practice underlying them. As earlier noted in this opinion, both of these avenues of rebuttal are open to

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[12] Another factor suggesting great caution in making fine-tuned use of standard deviation analysis in these cases is that its reliability diminishes in ways probably not susceptible of precise handling by courts as the binomial distribution sample diminishes in size. See W. Hays & R. Winkler, Statistics: Probability, Inference and Decision 222-26 (1971). The Supreme Court has not indicated the size samples reliably susceptible to this analysis. *Castaneda*, dealing with an observed figure of more than 300 in a sample of 870, referred in its discussion to the general rule "for such large samples." 430 U.S. at 496 n.17. The smallest sample in *Hazelwood* where the same sort of standard deviation analysis was discussed was 123. 433 U.S. at 311 n.171. This is therefore the smallest sample considered by the Court in this context, as noted by the district court. 21 F.E.P. Cases at 1558 n.54. Significantly, the categories in the district court's analysis which yielded the smallest standard deviations -- Suffolk official/managerial employees -- also represented the smallest samples: four to five. We are aware that in *EEOC* v. *United Virginia Bank/Seaboard National*, 615 F.2d 147 (4th Cir. 1980), a divided panel of this court used a standard deviation analysis in respect of samples even smaller than some in the present case. That panel recognized, however, that at some point sample size affects the reliability of this mode of analysis, *id.* at 151, 152, and employed it there as merely one of several factors demonstrating error in a district court's factual determination that a statistically based prima facie case had been established.

[13] See Appendix C.

an employer, and the district court apparently relied upon them as alternative grounds in concluding that the prima facie case had been rebutted. See note 6 *supra*.

We address these in reverse order, looking first to the conclusion that the number of hiring decisions was insufficient to support a conclusion of discrimination in their making. Because the prima facie statistical proof of discrimination was keyed to different employment categories based upon qualifications, hence involved different labor pools for base data, analysis of the sufficiency of rebuttal proof in these two respects must similarly be separately assessed.

ANB's rebuttal applicant flow evidence showed that in Suffolk ANB hired 35 clerical employees and 2 managers over the seven year period 1969-1975, while in Portsmouth during the single year 1975 it hired a total of 23 clerical employees and 2 managers. 21 F.E.P. Cases at 1556 n.51. These are, in absolute terms, concededly small samples from which to attempt straight comparisons with applicant pools or general labor pools as sources of base data. Samples too small are suspect as a basis upon which to infer any pattern of discrimination in making employment decisions. See *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620 (1974). But, aside from the Supreme Court's general observation in *Mayor of Philadelphia* that on the very special facts there presented "the District Court's concern for the smallness of the sample presented by the 13-member Panel was also well founded," *id.* at 621, we have no guidance as to how small is too small other than our own best judgment.

There are two conflicting considerations to be kept in mind in exercising that judgment. The danger of unfairness to the employer in resting inferences of discriminatory employment practices on proof involving small total members of employment decisions is obvious. But there is the countervailing consideration that, given the difficulties of proving discriminatory motive under any circumstances, see *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972); *United States*

v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), a too ready rejection of claims solely on this account practically precludes proof of discrimination in circumstances involving local employers with relatively small total work forces. Courts have simply to balance the two with an eye to protecting against purely speculative findings of discrimination while not cutting off the claims of some employees simply because of the small overall size of the work forces in which they happen to be employed. See *Chicano Police Officers' Ass'n* v. *Stover*, 526 F.2d 431, 439 (10th Cir. 1975). This difficult balancing problem is made even more difficult where, as here, the charged discrimination runs to several categories of differently qualified employees so that, under developed doctrine, proof must be assessed separately as to each. In this situation we think it is entirely proper in gauging the danger of unfair inferences from small numbers in respect of one category to take into account -- for this limited purpose -- any patterns inferable from the total range of hiring decisions affecting all categories during a charged period of discrimination.

Guided by these general considerations, we cannot find error in the district court's conclusion that the total number of hiring decisions affecting managers in the Suffolk branches -- on ANB's undisputed evidence but two over a seven year period -- was too small fairly to support any inference of a discriminatory pattern of hiring. On this basis we agree that the prima facie case was rebutted with respect to this category of employee notwithstanding the proof pro and con with respect to other categories.

With respect to the numbers of decisions affecting both managers and office/clerical employees in the Portsmouth branches, we find error in the district court's apparent conclusion that those numbers were also insufficient for inferential purposes. They were limited in ANB's proof to those for just one year, 1975. For reasons more fully developed in our later discussion of the sufficiency of the applicant flow data affirmatively to rebut the prima facie case, we do not consider this omission of proof running

to the whole record excusable on ANB's part. Accordingly, we conclude that as to these categories, the prima facie statistical case is not rebutted by this obviously incomplete showing of the total number of hiring decisions made over the charged period.

With respect to the number of hiring decisions affecting office/clerical positions in Suffolk over the charged period -- thirty-five on ANB's proof -- we think it quite sufficient as a basis for inferring the pattern of discrimination prima facie established. Accordingly, we find error in the district court's contrary conclusion as to this category.

More fundamentally, the district court concluded that ANB's applicant flow data in any event sufficed affirmatively to rebut the statistically based prima facie case by showing that its hiring decisions during the charge period were not discriminatorily motivated. *Hazelwood* has of course established that a prima facie statistical case can be so rebutted. 433 U. S. at 313. Because employment discrimination was not illegal under Title VII until 1965, "[an] employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." *Id.* at 309. Applicant flow data obviously is adaptable to that end. To be considered for this purpose, however, the particular data offered must be "sufficiently reliable . . . to permit consideration of [an employer's] argument that those data may undercut a statistical analysis dependent upon hirings alone." *Id.* at 313 n.21.

Over the EEOC's objections the district court found ANB's applicant flow data sufficiently reliable to consider in rebuttal of the work force statistics. When the court then assessed the data it concluded that because it did not give rise to an inference of discrimination, it sufficed to rebut the prima facie case made out by the static work force statistics. 21 F.E.P. Cases at 1555-56. We think the district court erred in its conclusion that the data was sufficiently reliable to be considered as rebutting evidence. Its

reliability is suspect on three separate bases which in conjunction undercut its probative force for the intended purpose.[11]

First, the applicant flow data for the Portsmouth branches is limited to only one of the charged years, 1975. Applicant flow data limited to one out of seven relevant years cannot be held to rebut a prima facie case based upon gross disparities revealed in static work force statistics over the period. It simply has not that probative force. The district court recognized its unreliability because of incompleteness, but excused the incompleteness because of what it considered the EEOC's bad faith in failing to notify ANB until commencing action that the Portsmouth branches were to be included in the charges.

In consequence ANB had destroyed its pre-1975 records for Portsmouth, a decision which the district court concluded was reasonable and which accordingly should not be allowed to prejudice ANB in presenting its rebuttal evidence. We find nothing in Title VII, EEOC regulations, or Supreme Court interpretations of Title VII that would operate to relieve employers of the normal consequences of such a deficiency of proof.

The district court found sufficient excuse by negative implication from the EEOC's requirement that all applications for employment be routinely preserved for six months, and that after a charge has been filed all relevant records be maintained until final disposition. 29 C.F.R. § 1602.14(a) (1976). From this the court concluded that ANB was reasonably entitled to decide, after the reasonable cause determination which did not include Portsmouth had been made, that preservation of relevant

[11] We do not consider still another possible basis of unreliability because of a lack of factual basis for assessing it. In some cases the comparison of hires to the relevant applicant pool for rebuttal may be entirely inappropriate because the employer's discriminatory hiring practices are so well known throughout the community that blacks may be reluctant to apply because such an effort would be futile. See, *e.g.*, *Lea* v. *Cone Mills Corp.*, 301 F. Supp. 97, 102 (M.D.N.C. 1969), *aff'd in relevant part* 438 F.2d 86 (4th Cir. 1971). There is no direct evidence to support this in the record.

application forms for those branches were not necessary. 21 F.E.P. Cases at 1555.

Leaving aside all questions of the reasonableness of such a business decision, we disagree with consequence given it by the district court. The affirmative obligation imposed by § 1602.14(a) to preserve records was clearly designed to protect Title VII plaintiffs from an employer's destruction of possibly damaging evidence. This being its purpose, it cannot sensibly be interpreted as being intended also to protect employers against the consequences of their voluntary destruction of such records just because the affirmative obligation to preserve them has expired. So to interpret it would license a self-serving destruction of records by avoiding the normal factual inference of self-serving that arises from the destruction of evidence. This we think could not accord with the broad remedial purposes of Title VII. See *EEOC* v. *Cook Paint & Varnish Co.*, 24 F.E.P. Cases 51, 55 (W.D. Mo. 1980). Employers have been on notice since the earliest days of Title VII's enforcement of the critical importance of the maintenance of employment records going back at least to the effective date of the Title. In consequence, holding this employer to the normal litigation consequences of a failure to maintain relevant employment records imposes no higher standard than that dictated by sound business judgment in respect of the maintenance of all business records having potential relevance in any of the litigation patterns to which businesses stand constantly exposed.

Next, the data's reliability is open to serious question because it apparently reflected less than half -- the EEOC contended only 46% -- of the actual applicants from 1969-1975. The district court dismissed the EEOC's contention of its unreliability on this score, finding that the contention was based upon a confused reference to the proportion of the available applications requested by the EEOC during discovery. 21 F.E.P. Cases at 1554. Whether or not the EEOC confused its references, it seems highly unlikely on the record we review that this data represents

substantially all the applicant flow data for the years in question. As the district court noted, the total number of applications reflected in the data offered the court varied widely from year to year, from a low of sixteen in 1972 to a high of ninety-seven in 1974. *Id.* at 1554 n.42.

Finally, the data considered by the district court included service workers.[15] Because 100% of the service workers hired in both Suffolk and Portsmouth were black, including them distorted the picture of minority hiring in the contested categories. If we limit the applicant flow data to office/clerical workers categories, purging the data, as offered, of all officials/managers and service worker hires,[16] it completely fails to dispel the inference of discrimination found by the district court to have been created by the EEOC's statistical proof. In Suffolk, ANB never hired more than one black clerical worker at a time -- in some years none. The Suffolk samples for each year are concededly small, but the overall results simply confirm rather than dispel the

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[15] ANB contests the EEOC's assertion that the district court "lumped" together managerial, clerical and janitorial categories for its analysis of the applicant flow data. Brief for Appellee 31 n.15. Both parties are correct. The court combined all hires in its general analysis of the statistical disparities, 21 F.E.P. Cases at 1555-56, but, separated out janitorial and managerial hires for its standard deviation analysis of the figures. *Id.* at 1559-60. However, in assessing the correctness of the district court's general evaluation of the applicant flow data, we note that for that purpose all employees were "lumped" together.

[16] The clerical category in Suffolk is all we consider here, given our conclusions that the prima facie case with respect to managers had been rebutted. Further, consistent with our position that where special qualifications are required the rebuttal data must also be so categorized, we approach the Portsmouth data by category and consider only the clerical hires due to the small number of managerial hires. The district court noted that two management trainees and two black service workers were hired in Suffolk during 1969-1975 and in Portsmouth in 1975. 21 F.E.P. Cases at 1559 n.57, 1560. Removing these hires and all service-worker applicants from the data, we are left with:

(Continued on next page)

(fn. 16 continued)

Suffolk Branches

	Number of Applications		Number of Hires	
	White	Black	White	Black
1969	22	7	4	1
1970	40	6	2	0
1971	59	20	1	1
1972	11	4	4	1
1973	60	19	7	0
1974	62	35	6	1
1975	40	6	6	1
Total	294	97	30	5

These figures translate into the following percentages:

	Percentage of Applications		Percentage of Hires	
	White	Black	White	Black
1969	76.7	23.3	83.3	16.7
1970	87.2	12.8	100.0	0.0
1971	74.7	25.3	50.0	50.0
1972	73.3	26.7	80.0	20.0
1973	75.9	24.1	100.0	0.0
1974	63.9	36.1	85.7	14.3
1975	87.0	13.0	85.7	14.3
	75.2	24.8	85.7	14.2

Portsmouth Branches

	Number of Applications		Number of Hires	
	White	Black	White	Black
1975	377	113	22	1

These figures translate into the following percentages:

	Percentage of Applications		Percentage of Hires	
	White	Black	White	Black
1975	76.9	23.1	95.7	4.3

prima facie case based upon static work force statistics: over these years, during which blacks made up 24.8% of the qualified applicant pool, only 14.2% of those hired in these categories were black. In Portsmouth the limited data for 1975, purged of service workers, not only fails to dispel the prima facie case but reinforces it. ANB's seven Portsmouth branches in 1975 hired one black clerical worker -- 4.3% of its hires -- out of an applicant pool 23.1% black.[17]

We conclude, with respect to the Office/Clerical category in Suffolk and Office/Clerical and Officials/Managers categories in Portsmouth, that the district court erred in ascribing to the defendant's applicant flow data the neutralizing effect reflected in that court's decision. At this stage in its analysis, the district court should instead have concluded, as we now do, that the prima facie case of discrimination for those categories made out on the static work force statistics had not been rebutted by this data.

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[17] The district court applied a standard deviation analysis to the office and clerical worker segments of the applicant flow figures, correctly finding the officials and managers categories of hires too small for such analysis. 21 F.E.P. Cases at 1559-60. In doing so, although the statistical and numerical comparisons were between the annual applicant pools and hires, the court analyzed the hires in relation to the qualified labor pool statistics for each city rather than the applicant pool. The court found this comparison mandated by *Hazelwood* and *Castaneda*. *Id.* at 1556 n.53. We find no such rule emanating from either case, noting that *Hazelwood's* discussion was merely collateral given that the Court ordered a remand to the district court for further findings on that data, 433 U.S. at 313, and pointing out also that *Castaneda's* comparison of jury composition to general population figures was not only logical but unavoidable because juries are not selected from applicants but from the citizenry at large. Further, it is manifestly incorrect to compare hires with the applicant pool and then test these statistical comparisons by a standard deviation analysis based on different population statistics. Therefore, the district court's particular use of the standard deviation analysis was without legal or factual basis, and we disregard it entirely. Because of the demonstrated unreliability of these figures there is no need to attempt a correct reanalysis of the statistical significance of these disparities.

C.

We turn next to the way in which the district court assessed the EEOC's nonstatistical evidence of specific hiring practices. Specifically the EEOC alleged and introduced evidence to prove that between 1969 and 1975 ANB failed to use objective, job related standards, used inconsistent standards and perpetuated the predominantly white work force through a preference for friends and relatives of employees and word-of-mouth recruiting (including walk-in hiring), and by maintaining an all-white interviewer staff.

The district court concluded that all these practices, individually and collectively assessed, were lawful and created no inference of discrimination.[15] Specifically, the court concluded that hiring was not conducted primarily through "word of mouth recruiting"; that there was no preference for friends or relatives of employees; that most of the hiring standards used, though unwritten, were sufficiently specific and objective, and were consistently applied; that the subjective evaluations of attractiveness, neatness, maturity and personality, and ability to communicate were justified by legitimate and important business considerations and applied in a nondiscriminatory way; and that

[15] The district court also examined a number of specific practices "which the EEOC, before and at trial, suggested were discriminatory." 21 F.E.P. Cases at 1560. Many of these allegations were made in the reasonable cause determination but were apparently not actively pursued at trial. The district court stated repeatedly in evaluating these claims that the EEOC put on no evidence to support them. We find no error in the resulting findings and conclusions regarding the discriminatory effect of retail credit checks, the requirement for a high school diploma, the requirement for character and employment references, testing, the failure to correspond with applicants or college education as a negative factor. To the extent the EEOC's failure to follow up charges with attempted proof reflected irresponsible broadside charging -- a conclusion apparently drawn by the district court -- we obviously do not condone the practice and indeed approve the district court's implicit condemnation of it. This does not, however, relieve either that court or this one of the obligation to subject evidence actually adduced of other hiring practices to independent, objective evaluation.

the use of an all-white interviewing staff had no discriminatory effects. From this the court concluded that the hiring practices evidence actually operated with the applicant flow data and the standard deviation analysis to undercut the statistically based prima facie case, rather than to corroborate or bolster it as intended by the EEOC. In this conclusion we find error of law.

While we are not prepared to say that attempted proof of this sort may never, by reason of its intrinsic weakness, have such a negative effect upon a prima facie statistical case, this evidence could not properly be given such an effect. The district court's legal analysis leading to its contrary conclusion is flawed in two ways.

First, it failed to assess the evidence in the light of, and colored by, the gross underrepresentation of blacks in ANB's work force already statistically demonstrated to the district court's satisfaction. This was at odds with the teaching of such cases as *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975) and *Rock* v. *Norfolk & Western Ry.*, 473 F.2d 1344 (4th Cir. 1973), that where such an imbalance in the work force has been statistically shown, the uses of particular hiring practices are then to be assessed for their tendency to perpetuate that imbalance, an assessment in which they may properly be found to be "badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the . . . work force." *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972). Here, rather than analyzing the hiring practices on a basis which assessed their tendency to perpetuate an existing condition of underrepresentation, the district court approached them as if no such imbalance existed. Inquiry was confined to specific practices isolated from any inferences of discrimination already established. It was, in effect, as if the EEOC had sought to base its case solely upon the nonstatistical evidence related to hiring practices. The resulting analysis failed properly to take into account the backdrop of existing imbalance against which the practices were carried out and in consequence misapplied controlling legal principles to the evidence.

This general approach obviously colored the district court's overall analysis of the specific hiring practices challenged by the EEOC. In addition, we think the assessment of certain of the specific practices was further tainted by faulty analysis of the evidence addressed to those practices. To show why, we briefly summarize the pertinent evidence and the district court's assessment.

The uncontradicted evidence showed that ANB relied almost exclusively upon walk-ins as a primary source of new employees, never advertising a vacancy unless it had exhausted the file without filling the position. Applicants were required to list on their applications friends or relatives employed by the bank. Thirty-two of sixty-five applicants hired in Suffolk from 1969-1975 and in Portsmouth in 1975 -- 49.2% -- had listed friends or relatives on their applications. Further, the applicants were screened and interviewed by an all-white interviewer staff whose evaluations of their attractiveness and neatness were very important factors in hiring. The EEOC contended that this evidence was probative of one of the traditional "badges of discrimination": word-of-mouth recruiting rather than general advertising through established public channels to fill vacancies. Specifically, this was said to be established as the standard hiring practice by the facts that (1) friends and relatives of employees were demonstrably preferred, (2) vacancies were not advertised until after on-file applications were depleted, and (3) no notices of vacancies were posted to employees. The court essentially rejected this evidence as having no probative force. It did not show that word-of-mouth was the primary hiring technique of the defendant because (1) there was no preference for friends or relatives; (2) ANB "did attempt to 'advertise' itself to qualified minorities outside its work force";[19] (3) the screening process was not "tainted with discriminatory intent [nor did it operate] (through word-of-month recruitment or preference for friends or relatives of employees, for example) to perpetuate minority representation"; and (4) the failure to post notices to its employees was not a

violation of Title VII because the evidence of discrimination was at best inconclusive. 21 F.E.P. Cases at 1566.

The court's finding that there was no preference for friends and relatives was crucial to the conclusion that word-of-month recruiting was not shown to be the primary means for filling vacancies. The evidence showed that thirty-two of the sixty-five hires -- 49.2% -- at Suffolk in 1969-1975 and Portsmouth in 1975 had listed friends or relatives on their applications. From this the court concluded that "[i]f anything, the . . . statistics show[ed] that the listing of friends and relatives was a minor factor; a majority of the hires had no 'contacts' working for defendants." *Id.* at 1565.

Without ascribing controlling significance to this particular factor in the overall assessment of ANB's hiring practices, we observe that if anything, this data implies that the listing of friends and relatives did indeed tend to perpetuate the

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[11] The district court concluded at one point that the only word-of-mouth recruiting shown was that involving some affirmative efforts made by ANB to recruit qualified black employees, and that this obviously did not tend to prove discriminatory motive in hiring. While the court did consider and reject other suggestions of word-of-mouth recruiting, its apparent perception that this was the only direct evidence on the issue in the record clearly influenced the ultimate conclusion that the EEOC had failed to establish word-of-mouth recruiting as its primary hiring procedure. This completely warps the meaning and significance of the term in the context of Title VII litigation. As developed in this context, the term connotes a passive dependence for applicants upon informal advertising of vacancies through employees' communications to friends, relatives and acquaintances and upon walk-in applicants, rather than upon systematic public advertising designed to reach the qualified available labor pool. There was of course substantial direct evidence in the record of word-of-mouth recruiting so understood.

Significantly, the court did not find and ANB does not contend that the affirmative action recruiting effort upon which the court focused in assessing the claim of word-of-mouth recruiting produced any results. Properly assessed this evidence simply shows one episodic means of recruiting used by ANB within an unmistakable general pattern of word-of-mouth recruiting assuredly not aimed specifically at blacks whether or not deliberately aimed to exclude them.

underrepresentation of blacks in non-service jobs and their concentration in service jobs.[20] Whether this practice was a major factor in hiring or not, its unmistakable tendency to perpetuate the existing racial imbalance in the work force could not properly be dismissed as of no consequence.

In similar fashion, the district court essentially rejected out of hand any significance for the fact that throughout the charged period, ANB used an all-white interviewing staff. We cannot quarrel with the court's related conclusions that the criteria used for selection were for the most part objective and consistently applied, and that the subjective evaluations of attractiveness and neatness were business-justified. Furthermore, it is clear that the use of an all-white interviewing staff standing alone could not support a determination of liability. Nevertheless, it was error to reject as having no probative force on the issue of discriminatory hiring practices the fact that in a racially imbalanced setting, the staff charged with the duty of evaluating personal characteristics of job applicants was maintained all-white throughout the charged period. See *Fisher* v. *Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 545-46 (5th Cir. 1980); *Domingo* v. *New England Fish Co.*, 16 E.P.D. ¶8207 at 5070, 5080 (W.D. Wash. 1977).

In summary, on this aspect of the case we conclude that, rightly assessed, the EEOC's evidence of word-of-mouth recruiting as the

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[20] Of the sixty-five hires, ten were black. Of these, two, or 20%, had listed friends or relatives on their applications. 21 F.E.P. Cases at 1565. Of the ten blacks hired, four were hired as service workers, including the two who listed friends on their applications. Comparing proportions of white and black hires listing friends, and noticing the percentage of black service workers who listed friends, we must eliminate the hypothesis that listing friends was a minor factor:

		Listing friends/relatives	
		Number	Percent of total
Total hires	65	32	49.2
White hires	55	30	54.5
Black hires	10	2	20.0
Black service worker hires	4	2	50.0
Black non-service worker hires	6	0	0.0

primary means used by ANB to fill vacancies, and the use of an all-white interviewing staff to make its subjective hiring evaluations tended to corroborate -- to some degree at least -- the prima facie showing of discrimination made by the static work force statistics. The district court's apparent conclusion that it had no such probative force or that its lack of force tended indeed to rebut the prima facie statistical showing reveals a misapprehension or misapplication of controlling principles of law.

D.

We now briefly consider the district court's analysis of the EEOC's evidence of individual instances of discrimination. As earlier indicated, 31 of 52 black persons identified by the EEOC as victims of individual acts of discrimination in hiring gave testimony, and the district court found on the evidence presented that none was a specific victim of discrimination. In consequence, as with the hiring practice evidence, the district court dismissed this evidence as having no probative force in respect of the pattern or practice issue, or possibly treated it as having a negative impact for that purpose.

Because we conclude that the EEOC's prima facie case was otherwise established and not rebutted without reference to this evidence, we find it unnecessary to review the district court's findings and conclusions which led to its out of hand rejection. We observe only that the evidence was not offered at this stage to establish entitlement to individual relief, but merely as corroborating or buttressing evidence of a general pattern of racial discrimination in hiring. Assuming for purposes of this appeal that its cumulative impact for this purpose was rightly assessed by the district court as not buttressing the EEOC's other evidence, we hold that neither could its cumulative impact be properly adjudged to rebut the EEOC's case. Given the basis of our disposition, it may simply be set aside as a neutral factor in the overall assessment of the evidence.

E.

Looking now to the whole body of evidence before the district court, we hold, in concluding summary, that (1) the district court correctly determined that the EEOC's static work force statistics established a prima facie case of discriminatory pattern or practice of hiring during the charged period; (2) except with respect to the Officials/Managers category in Suffolk, the district court erred as a matter of law in holding that this prima facie case was rebutted by the combined force of the standard deviation analysis applied to the static work force statistics, the applicant flow data for the charged period as tested by a standard deviation analysis, and the weakness or negative impact of the EEOC's nonstatistical evidence of hiring practices and individual instances of discrimination. Analyzed free of the identified errors of misapprehension and misapplication of controlling legal principle, we conclude that the evidence before the district court established a prima facie case based upon the statistically revealed gross disparities in the work force; that this was buttressed to some degree by evidence of hiring practices which tended to perpetuate the undisputed racial imbalance; and that this prima facie case -- except in one respect -- was never rebutted by legally sufficient evidence.

Accordingly, we hold that, except in respect of the one category of officials/managers in the Suffolk branches, the total evidence established the existence of a discriminatory pattern or practice of hiring in violation of Title VII that requires remand for the determination of appropriate relief.

IV

Upon remand the EEOC is entitled to an injunctive decree appropriately shaped to remedy the consequences of the discriminatory hiring policy we find conclusively established upon the record, and to further proceedings in which individual persons claiming to have suffered the consequences of that pattern or practice during the charged period may have their individual claims adjudicated. In these Stage II proceedings, an individual

claimant is entitled, upon proving only that he or she was a black who applied unsuccessfully for a job with the defendant during the relevant period, *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978), to the benefit of an inference that the decision not to hire "was made in pursuit of that policy of discrimination." *Teamsters*, 431 U. S. at 362. The burden then shifts to the employer to show "that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* This burden involves showing by a preponderance of the evidence that nondiscriminatory factors motivated the decision not to hire. *Sledge* v. *J. P. Stevens*, 585 F.2d at 637. If the defendant meets this burden, the individual claimant is then entitled to show that the "exculpatory reason advanced by the employer is mere pretense -- that, for example, white persons with qualifications identical to those of the claimant or who also did not meet the prescribed qualifications were nonetheless assigned to the position sought." *Id.*

As earlier noted, the district court has made findings and conclusions in respect of some persons who may present claims in the Stage II proceedings. Those findings and conclusions, made in connection with the general issue of the existence of a discriminatory pattern or policy and under different burdens of proof, have no preclusive effect in Stage II proceedings.

Consistent with the result we reach on the merits, we vacate the district court's award of attorney's fees in favor of ANB.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

APPENDIX A
General Work Force Statistics

Suffolk Branches

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nansemond County
1968	3	8.3	31.0	47.9
1969	3	11.1	31.0	47.9
1970	4	13.8	31.0	47.9
1971	5	17.9	31.0	47.9
1972	5	17.2	31.0	47.9
1973	3	9.7	31.0	47.9
1974	2	8.3	31.0	47.9
1975	2	10.5	31.0	47.9

Portsmouth Branches

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	7	5.6	36.0	25.1
1969	6	4.4	36.0	25.1
1970	8	5.4	36.0	25.1
1971	11	7.1	36.0	25.1
1972	15	8.9	36.0	25.1
1973	15	9.1	36.0	25.1
1974	15	8.4	36.0	25.1
1975	16	10.4	36.0	25.1

Consolidated Figures (Suffolk and Portsmouth Branches)

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	10	6.3	31.0	47.9	36.0	25.1
1969	9	5.5	31.0	47.9	36.0	25.1
1970	12	6.8	31.0	47.9	36.0	25.1
1971	16	8.7	31.0	47.9	36.0	25.1
1972	20	10.2	31.0	47.9	36.0	25.1
1973	18	9.2	31.0	47.9	36.0	25.1
1974	17	8.1	31.0	47.9	36.0	25.1
1975	18	10.0	31.0	47.9	36.0	25.1

APPENDIX B

Special Qualification Work Force Statistics

Suffolk Branches

Officials and Managers

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nansemond County
1968	0	0.0	8.0	10.9
1969	0	0.0	8.0	10.9
1970	0	0.0	8.0	10.9
1971	0	0.0	8.0	10.9
1972	0	0.0	8.0	10.9
1973	0	0.0	8.0	10.9
1974	0	0.0	8.0	10.9
1975	0	0.0	8.0	10.9

Office and Clerical Workers

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nanesmond County
1968	0	0.0	10.3	22.5
1969	0	0.0	10.3	22.5
1970	1	5.3	10 3	22.5
1971	2	11.1	10.3	22.5
1972	2	10.0	10.3	22.5
1973	1	4.8	10.3	22.5
1974	0	0.0	10.3	22.5
1975	0	0.0	10.3	22.5

Service Workers

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nansemond County
1968	3	100.0	44.8	58.1
1969	3	75.0	44.8	58.1
1970	3	75.0	44.8	58.1
1971	3	75.0	44.8	58.1
1972	3	100.0	44.8	58.1
1973	2	100.0	44.8	58.1
1974	2	100.0	44.8	58.1
1975	2	100.0	44.8	58.1

Portsmouth Branches

Officials and Managers

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	0	0.0	6.9	4.8
1969	0	0.0	6.9	4.8
1970	0	0.0	6.9	4.8
1971	0	0.0	6.9	4.8
1972	0	0.0	6.9	4.8
1973	1	2.8	6.9	4.8
1974	1	2.8	6.9	4.8
1975	1	2.7	6.9	4.8

Office and Clerical Workers

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	1	1.1	21.5	13.9
1969	0	0.0	21.5	13.9
1970	3	3.2	21.5	13.9
1971	5	4.9	21.5	13.9
1972	8	6.5	21.5	13.9
1973	7	5.9	21.5	13.9
1974	7	5.3	21.5	13.9
1975	10	9.3	21.5	13.9

Service Workers

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	6	85.7	59.2	45.3
1969	6	100.0	59.2	45.3
1970	4	80.0	59.2	45.3
1971	5	83.3	59.2	45.3
1972	7	87.5	59.2	45.3
1973	7	87.5	59.2	45.3
1974	7	87.5	59.2	45.3
1975	5	83.3	59.2	45.3

Combined Figures (Suffolk and Portsmouth Branches)
Officials and Managers

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	0	0.0	8.0	10.9	6.9	4.8
1969	0	0.0	8.0	10.9	6.9	4.8
1970	0	0.0	8.0	10.9	6.9	4.8
1971	0	0.0	8.0	10.9	6.9	4.8
1972	0	0.0	8.0	10.9	6.9	4.8
1973	1	2.3	8.0	10.9	6.9	4.8
1974	1	2.4	8.0	10.9	6.9	4.8
1975	1	2.3	8.0	10.9	6.9	4.8

Office and Clerical Workers

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	1	0.8	10.3	22.5	21.5	13.9
1969	0	0.0	10.3	22.5	21.5	13.9
1970	4	3.5	10.3	22.5	21.5	13.9
1971	7	5.8	10.3	22.5	21.5	13.9
1972	10	7.0	10.3	22.5	21.5	13.9
1973	8	5.8	10.3	22.5	21.5	13.9
1974	7	4.5	10.3	22.5	21.5	13.9
1975	10	7.9	10.3	22.5	21.5	13.9

Service Workers

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	9	90.0	44.8	58.1	59.2	45.3
1969	9	90.0	44.8	58.1	59.2	45.3
1970	7	77.8	44.8	58.1	59.2	45.3
1971	8	80.0	44.8	58.1	59.2	45.3
1972	10	91.0	44.8	58.1	59.2	45.3
1973	9	90.0	44.8	58.1	59.2	45.3
1974	9	90.0	44.8	58.1	59.2	45.3
1975	7	87.5	44.8	58.1	59.2	45.3

APPENDIX C
Applicant Flow Data

Suffolk Branches

	Number of Applications		Number of Hirees	
	White	Black	White	Black
1969	23	7	5	1
1970	41	6	3	0
1971	59	20	1	1
1972	11	5	4	2
1973	60	19	7	0
1974	62	35	6	1
1975	40	7	6	2
Total	296	99	32	7

These figures translate into the following percentages:

	Percentage of Applications		Percentage of Hirees	
	White	Black	White	Black
1969	76.7	23.3	83.3	16.7
1970	87.2	12.8	100.0	0.0
1971	74.7	25.3	50.0	50.0
1972	68.7	31.3	66.7	33.3
1973	75.9	24.1	100.0	0.0
1974	63.9	36.1	85.7	14.3
1975	85.1	14.9	75.0	25.0
	74.9	25.1	82.1	17.9

Portsmouth Branches

	Number of Applications		Number of Hirees	
	White	Black	White	Black
1969	(not available)		(not available)	
1970	(not available)		(not available)	
1971	(not available)		(not available)	
1972	(not available)		(not available)	
1973	(not available)		55	11
1974	(not available)		65	12
1975	379	115	24	3

These figures translate into the following percentages:

	Percentage of Applications		Percentage of Hirees	
	White	Black	White	Black
1969	(not available)		(not availalbe)	
1970	(not available)		(not available)	
1971	(not available)		(not available)	
1972	(not available)		(not available)	
1973	(not available)		83.3	16.7
1974	(not available)		84.4	15.6
1975	76.7	23.3	88.9	11.1

RUSSELL, Circuit Judge, dissenting:

I dissent.

My difference with the majority opinion begins with its reversal of the district court's determination that it (the district court) was without jurisdiction in this proceeding to consider a claim of discrimination in hiring at the Portsmouth branch of the defendant Bank. The district court based its conclusion that hiring practices at the Portsmouth branch were not a proper subject of suit in this litigation because such practices had not been included in the initiating charge on which the Equal Employment Opportunity Commission (hereinafter EEOC) acted, or in the investigation conducted by the EEOC in connection with that charge, or in the reasonable cause detertmination of discrimination as made by the EEOC, or had been a subject of conciliation between the EEOC and the defendant.

All of the factual findings on which the district court rested this determination are clearly supported by the record. The charge of Ms. Holland filed with the EEOC in June, 1969, which provided the basis for this proceeding, related solely to a refusal of employment by officials at the Suffolk branch of the defendant. In her charge she made no reference whatsoever to the Portsmouth branch. When the EEOC undertook its investigation of the charge filed by Ms. Holland in March, 1970, it advised the defendant that it was sending its investigator to "Suffolk" and it requested that the "Suffolk branch" be informed of the impending visit of the investigator. It made no reference to any possible investigation of the Portsmouth branch or of any charges involving that branch. The investigator in the course of the investigation concerned herself solely with the Suffolk branch and its employment practices during most of the year 1969 and a few days in 1970. Later, when the reasonable cause determination, with its address of the employer given as "Suffolk, Virginia," was issued, it, as the district court points out, again focused exclusively on the hiring practices of the Suffolk branch during the period "March 1, 1969

through January 13, 1970." In that determination, the EEOC stated that as of May, 1969, the employees of the "respondent" consisted of 18 whites and no blacks in an office/clerical classification, a number which significantly was the exact number and character of employees at the Suffolk branch, as reported by the defendant for its Suffolk branch in its EEOC report of May, 1969. It also stated in its report which was dated March 11, 1974, that it had reviewed all applications for employment and that the defendant bank had "hired seven persons, six Caucasians and one Negro. Of these seven persons, five were hired into clerical or teller positions, one Negro and four Caucasians. The Negro teller was hired in November, 1969." These figures are also clearly identifiable as relating to the Suffolk branch alone, and related exclusively to the period ending January 13, 1970. Moreover, in its reasonable cause determination, the EEOC stated that, during its investigation, it had represented to the defendant that any records of employment at the Portsmouth branch were "irrelevant to employment at [the] Suffolk branch" which was the subject of its investigation. After its reasonable cause determination, the only conciliation engaged in between the defendant and the EEOC concerned the Suffolk branch and the facts disclosed by its investigation of that branch covering the period from March 1, 1969 to January 13, 1970.

In short, from the filing of the original charge in June, 1969, up to the filing of this action by the EEOC (in default of any action by Ms. Holland) in January, 1976, the EEOC had confined its investigations, its determinations of discrimination (dated March 11, 1974) and its conciliation efforts (held in July and August, 1974) exclusively and wholly to the employment practices of the defendant at the Suffolk branch for a period of time terminating on January 13, 1970, and, in refusing to consider any employment figures at the Portsmouth branch, had firmly rejected as "irrelevant" any inquiry into the defendant's employment practices at the defendant's Portsmouth branch.

Whether, under the circumstances detailed, the district court's jurisdiction in this case was confined to inquiry into hiring activities of the defendant at its Suffolk branch is a question controlled by our decision in *EEOC* v. *General Elec. Co.*, 532 F.2d 359 (4th Cir. 1976).[1] In that case, we said that the court's jurisdiction was not limited to the language of the charge as filed by a complaining employee or applicant but extended to such types of discrimination as were reasonably uncovered during the investigation of the charge by the EEOC, were included in the reasonable cause determination, and were the subject of conciliation between the EEOC and the employer. 532 F.2d at 372-73. We emphasized, however, that each step in this administrative procedure of (a) investigation, (b) reasonable cause determination and (c) conciliation, was an essential step under the Act and, as the majority opinions states, "each step. . . is designed to be a prerequisite to the following step and, ultimately, to suit."[2] And, again as the majority itself observes, this is particularly true of the conciliation step, which, in order to be effective, demands that the employer be fully notified of the violation which is the subject of conciliation.[3]

If the rule enunciated in *General Electric* is applied in this case, it cannot be disputed that the scope of the action filed by the EEOC in this case should be restricted to the employment practices at the Suffolk branch. That was the activity covered by the charge filed by the complainant. The EEOC itself strictly confined its investigations to employment practices for the relevant time period at that branch alone. Even more significant is the fact that the EEOC refused to consider or investigate any employment practices at the Portsmouth branch. And in its reasonable cause

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[1] *General Electric* was reaffirmed in *EEOC* v. *Chesapeake & Ohio Ry.*, 577 F.2d 229, 231-32 (4th Cir. 1978).

In Bridgesmith, Representing the Title VII Class Action: A Question of Degree, 26 Wayne L. Rev. 1413, 1417 (1980), The writer says:

> "Although courts are not overly restrictive in interpreting the administrative prerequisites to suit, a clear circumvention of the administrative scheme will result in the dismissal of the initial

(Continued on next page)

(fn. 1 continued)

complaint. In *Jerome* v. *Viviano Food Co.* [489 F.2d 965 (6th Cir. 1974)], the plaintiff filed a charge of sex discrimination with the EEOC but did not obtain a right to sue notice from the EEOC before instituting suit in federal court. The court granted the defendant's motion for dismissal, holding that an EEOC opportunity for investigation and conciliation is at the heart of the Title VII remedy and may not be avoided by a litigant in order to bring a judicial complaint. [*Id.* 966; *accord*, *Troy* v. *Shell Oil Co.*, 378 F.Supp. 1042 (E.D.Mich. 1974), *appeal dismissed as moot*, 519 F.2d 403 (6th Cir. 1975)].

"An obvious problem exists when the Title VII litigant is empowered to bring a judicial complaint which differs materially from that which was brought with the EEOC. If continuity is lacking between the administrative relief afforded by Title VII and a subsequent judicial proceeding, the administrative first step would be illusory. As a matter of due process to be afforded Title VII defendants, there should be some basic relationship between the judicial complaint and the EEOC charge which preceded it. There has never been a question that the EEOC charge and subsequent judicial complaint should somehow relate to one another. Much litigation has taken place, however, concerning the degree to which synonymy is required.

"One commentator stated that the applicable principle is one of affording the charged party with an opportunity for rebuttal. [See *Smalls*, *supra*, note 6, at 830, (28 S.C.L.Rev.)]. Therefore, if a substantially different issue arises late in the investigatory or conciliation process, the charged party has no opportunity to rebut. Rebuttal, in the nature of an opportunity to be heard, is necessary for the protection of due process. The question is clearly one of fact, and relatedness between an EEOC charge and a judicial complaint should be dependent upon adequate notice to the charged party and ample time to be heard." (Emphasis in text)

[3] Quoting from *EEOC* v. *E. I. duPont de Nemours & Co.*, 373 F. Supp. 1321, 1326 (D.Del. 1974).

[4] In *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976), we said "that the commission's statutory duty to attempt conciliation is among its most essential functions;" and, in *EEOC* v. *General Electric Co.*, 532 F.2d at 363, we added that "the opportunity to conciliate is a crucial issue in determining the issues open for adjudication in the civil suit."

determination, it made it crystal clear that any action at the Portsmouth branch was "irrelevant" to its investigation and to its reasonable cause determination. It was against this background that the EEOC filed this civil action, seven years after the charge of discrimination was filed, six years after it began its investigation of the charge, and two years after it had issued its reasonable cause determination, raising for the first time the question of discrimination at the Portsmouth branch, without a charge being filed, without an EEOC investigation, without an EEOC reasonable cause determination, and without any effort at conciliation by the EEOC of hiring practices at Portsmouth. If each step in the administrative procedure in a Title VII proceeding *i.e.*, an EEOC investigation, and EEOC reasonable cause determination, and an effort by EEOC at conciliation, is an essential "prerequisite. . . to suit," as the majority opinion declares, it would seem beyond controversy that there was no authority for inclusion of the employment practices at the Portsmouth branch in the civil suit by the EEOC in this case. Moreover, apart from the constricting language of the Act itself on the proper scope of this action, it is difficult to perceive under what principle of fairness and due process the EEOC should be permitted to inject into this proceeding at this belated date a claim that it had not merely failed to raise earlier but one that it had expressly asserted both in its investigation and in its reasonable cause determination was "irrelevant" to its inquiry.[1]

The majority opinion, though declaring unequivocally that "we require that a particular charge of discrimination be the subject of the reasonable cause determination and conciliation before being subject to suit by the EEOC," proceeds to reverse the district court and to find jurisdiction in this action over hiring practices at the Portsmouth branch. It bases this ruling on the reasoning that (a) the charge filed and investigated by the EEOC in connection with the Suffolk branch involved hiring practices which, if found illegal at Suffolk, would support a like finding in

[1] See Bridgesmith, *supra*, 26 Wayne L.Rev. 1413.

connection with the Portsmouth branch, (b) "the EEOC's investigation [in 1969-70] and attempted conciliation [in 1974] with regard to Suffolk [gave] adequate notice to the defendant of the practices under investigation and ample opportunity for conciliation concerning those practices," and (c) "[h]ad the conciliation effort been successful, given the common control over the similar practices at the two cities' branches, whatever changes were to be instituted at the Suffolk branch would no doubt logically and necessarily have been made at the Portsmouth branch as well." I submit no one of those reasons is sound.

A finding of hiring discrimination at the Suffolk branch on the evidence in this case would not necessarily establish discrimination at the Portsmouth branch. Decisions on hiring were made separately at the two branches by the interviewing officer of the respective branch. The labor market from which the two branches drew their job applicants were different and the two labor markets varied markedly in their black consitituency, measured both in numbers and in qualifications. So far as the EEOC's case rests on bare statistics, a finding of discrimination at either branch would depend on a comparison of the percentage of black hirees at each branch with the percentage of qualified blacks in the applicable labor market. The percentage of hirees as well as the percentage of qualified blacks in the applicable labor market, varied substantially at the two branches. Proof that the comparison of black applicants and hirees may have been sufficient at one branch to support an assumption of discrimination, based as such assumption would be on statistical data unique to that branch, would not establish that a similar situation existed at the other branch. Thus, if the statistical comparison resulted in a standard deviation of one at Suffolk and five at Portsmouth -- a result that could be possible because of the differences in the labor market and perhaps a difference in the attitude of the interviewing officers -- it could well be that any assumption of discrmination in hiring at Suffolk could not be justified but could be justified at Portsmouth. And the EEOC, as does the majority opinion, recognized all this, for it prepared and filed for the record separate

evidence and separate statistical data and reached different results in connection with the two branches. *A Fortiori*, it would follow that, under this supposition, Portsmouth might be required to make changes but Suffolk would not. Accordingly, two of the grounds assigned by the majority for its conclusion will not stand analysis.

The third ground is equally untenable. I suggest it is inexplicable to assume that an investigation which the EEOC itself had expressly noticed the employer was absolutely limited to one branch of the employer's business and where it had represented to the employer that any discussion or investigation of employment practices at another branch (Portsmouth) of the employer was "irrelevant" would be effective notice to the defendant that the EEOC would years later charge that the employment practices at such other branch (Portsmouth) were included within the investigation and conciliation which never touched that branch (Portsmouth) so as to provide a basis for a later civil suit involving that other branch. Such a doctrine, if accepted, would make meaningless and unimportant the statutory provision for a reasonable cause determination finding and an offer of conciliation by the EEOC as conditions to a right of suit as well as all the other procedural steps mandated by the statute as a "prerequisite" to suit. So long as the EEOC had met the prerequisites for suit on a charge involving one branch of an employer's business, it could, under the prinicple stated in the majority opinion, include at its whim in its suit, filed years later, charges of discrimination at all the branches of the employer even though the hiring practices at these other branches had never been investigated, had never been the subject of a reasonable cause determination, and had never been the subject of an offer of conciliation. Such a rule, if adopted, would mean that the new rule had washed out the step-by-step procedure so carefully laid down by Congress in the Act for the institution of a suit under Title VII. I am unwilling to participate in such guillotining of the Congressionally mandated procedure, under a novel exception

which would enable the EEOC to broaden almost at will a charge at one plant of an employer made in 1969, into a charge against all plants of the employer, made for the first time in 1976, even though the employer was never notified of such broadening of the charge or given any opportunity of conciliation on the broadened charge. The reasons assigned by the majority for including the Portsmouth branch, I respectfully suggest, are unsupportable.

The majority would find support for its conclusion in the opinions in *Statsny* v. *Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980), and *Hill* v. *Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979). Neither of those cases involved the precise point which is raised in this appeal. There was no question raised in either of those cases about the scope of the EEOC investigation, the reasonable cause determination or the range of the offer of conciliation or the effect of the absence of any of these actions on the right to maintain a civil suit. To such extent as it is analogous, *Hill* even would seem to be contrary to the result reached by the majority. One of the issues in *Hill*, for instance, was the extent to which a class representative could represent employees having the same claim at two or more plants of the employer which may be considered analogous to the issue here. The Court held specifically that the class representative could only represent class members who had suffered "injury" in precisely the same way" as he had in "other departments of the same facility" (Italics added). 596 F.2d at 102. That language would confine the class representation to the single facility or plant. If this situation can be taken as analogous to that now before us, it is manifest that the plaintiff in this case cannot meet the requirement established in *Hill*. Admittedly Portsmouth is not "the same facility" as Suffolk. *Hill* is thus unquestionably contrary to the majority's conclusion.

Hill did refer to and distinguish *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).[3]

[3] This case later came before the court in 586 F.2d 300 (1978), and in 634 F.2d 744 (1980).

In that case the issue involved whether the exemption under Title VII granted a bona fide seniority system was applicable to employees who work "not in different locations." In other words, the controversy related to what branches (*i.e.*, those "not in different locations") of an employer might be included within a claim that the employer's employment practices were immunized by a bona fide seniority system in connection with charges under Title VII. That question is quite analogous to that presented in this case. In *Patterson* the district court had found that the two plants, located a few blocks apart and engaged in the same general manufacturing operations, were "not in different locations" for the purposes of the Act and were accordingly not within the exemption. But -- and this is the important fact in the case --we held, in deciding that issue, "that the labor market is the most important factor in determining whether a company's employees work in different locations." 535 F.2d at 266. For authority the Court cited *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975). In *Russell*, the Court said at pp. 362-63:

> "Neither the Act nor the EEOC regulations define the statutory term "employees who work in different locations," and we deem it unwise to attempt to draft a definition for every situation. It is readily apparent, however, that the labor market is the most important criterion for determining whether a company's employees work in different locations. If the labor for each plant is recruited from different geographical areas, or if one plant requires labor possessing different skills from the labor employed at another company plant, it is obvious that the company cannot draw from the same labor market to man its plants. Under these circumstances, it generally can be said that the employees work at different locations. In contrast, if a company can operate two or more of its plants with employees from the same geographical area who are unskilled or possess the same skills, an applicant for a job can be assigned to an entry level

> position in either plant. Therefore, these employees, having been hired from the same labor market, would not generally fall within the statutory class of 'employees who work in different locations.'"

If the controlling factor is identity of labor market, as I deduce it is in the light of the decisions in *Patterson* and *Russell*, then it is improper to treat the two branches of Suffolk and Portsmouth as one and to find that a discrimination charge against a branch in one labor market may be considered a charge against another branch of the same employer in another labor market. That, however, is what the majority does in this case and what I think is not warranted.

There is another reason, grounded on fair dealings and the fundamentals of due process, for denying jurisidiction over Portsmouth hiring practices in this suit. From 1969 to 1976, the EEOC was in effect representing to the defendant that there was no claim of hiring discrimination against the Portsmouth branch. As a result of its investigation of the Suffolk branch, the EEOC knew of the defendant's practice of discarding employment applications after six months. Thus it was in possession of the knowledge that when it told the defendant it had no interest in the Portsmouth records, the defendant would follow its routine practice of discarding all applications after six months, thereby destroying evidence of possible great value to it in establishing a rebuttal to any charges against it involving the Portsmouth branch by proof of applicant flow from 1969 to 1975. To permit the EEOC now, without a charge to investigate, without any investigation, without a reasonable cause determination, without notice and without an offer of conciliation, and after six years of implicit representation that it was making no claim of discrimination at the Portsmouth branch, and after the defendant had placed itself at a disadvantage in proof because of the EEOC's own conduct, to attempt to piggy-back Portsmouth onto Suffolk in a belated claim of hiring discrimination offends the purposes of

Title VII as well as that element of fundamental fair dealings which is at the base of due process. And, though it is not discussed in the majority opinion, prejudice to the defendant arising out of what has all the appearances of a legal "ambush," whether intended or not, was, as we see in a moment, one of the "triable issues" in this case. The very inclusion in the Act of the prerequisites to suits, to which I have already referred, was to prevent an "ambush" and to avoid the inevitable prejudice such an "ambush" would impose on an employer such as this defendant against whom the EEOC, after some seven years, unexpectedly and without prior notice, leveled the charges relating to the Portsmouth branch. Under the language and intent of the Act, as construed in *General Electric* and other like authorities, and under every principle of fundamental fairness, any inquiry into hiring practices of the Portsmouth branch should have been excluded from the case. The district court agreed. The majority reverses. I think the majority is wrong.

Turning from the jurisdictional issue to the consideration of the merits of the EEOC's claim of discrimination, I would begin with the stipulation of the parties on the issues triable in the case (apart, of course, from the jurisdictional issue involving the Portsmouth branch, already discussed). These issues were stipulated to be: "B. Whether defendant American National Bank failed or refused to initially hire black employees because of race from 1969 to 1975.[*] C. Whether any of the individual claimants whom EEOC presents at trial were denied employment . . . because of their race. D. Whether the passage of time has prejudiced defendant." In connection with those issues, the parties, prior to trial, entered into certain supplementary stipulations. First, they stipulated that the charges of discrimination were limited to initial hirings in two employment classification (*i.e.*, (1) officer/manager, and (2)

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[*] Just as in *EEOC* v. *United Bank/Seaboard National*, 615 F.2d 147, 149 (4th Cir. 1980): "There is no claim of other racial discrimination in such things as promotions, transfers, pay, etc., which, as often as not, appear in litigation of this nature."

office/clerical)[7] in the years 1969 to 1975 at two branches, one at Suffolk, and the other at Portsmouth.[8] It is important to emphasize that, as the EEOC has stipulated, the action was not concerned with any hiring by the defendant prior to 1969, nor was it concerned with the composition of the defendant's work force prior to 1969. What was in issue under the stipulation of issues agreed on by the parties was the change in the composition of such employment classification as a result of hirings from 1969 through 1975, and whether hirings in that classification were racially motivated.[9] They also stipulated the statistical data as shown by the 1970 census on the racial breakdown of Total Population and Labor Force characteristics for Norfolk, Suffolk, Nansemond County, Portsmouth, Norfolk-Portsmouth, and that the breakdown of "Workforce Availablility Data on Minority Groups and Women in the Recruitable Labor Market Area" in those areas.[10] Under these compilations, the parties did not differ on the black qualified labor force in these various areas. According to the charts on the office/clerical classification, the representation of blacks was 10.3% in Suffolk and 22.5% in Nansemond County. The comparable figure in Portsmouth proper was 13.9%

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[7] The majority concedes that the evidence was insufficient to support a finding of discrimination in connection with hiring in the officer/manager category. We are thus only concerned with hirings in the office/clerical category.

[8] In this discussion of the merits of the claim, we deal with the Portsmouth branch as well as the Suffolk branch, though, under what I conceive to be the proper issue in the case, the Portsmouth branch operation should have no place in this discussion. Since, however, the majority has dealt with the Portsmouth branch as properly within the issues and since, as I view it, there is no basis for an action involving the Portsmouth branch, I have chosen to deal with the Portsmouth branch despite my firm opinion that the court in this case should never have considered the Portsmouth branch as a proper subject of inquiry here.

[9] See the language of Justice White in *Hazelwood*, quoted later, 433 U.S. at 347-48.

[10] Stipulations 37 and 38.

and 21.5% for Norfolk-Portsmouth. The parties, also, stipulated the employment practices followed by the bank in its employment decisions.

Though offering the same types of employment, the two branches received separately any applications for employment at their separate branch offices and made thier own separate determination on hiring. The branches were located about twenty-five miles apart in an area of the State where access between cities is not especially easy. In their employment, the two branches drew from entirely different labor markets. The district court found, and the majority accepts the finding, that the Suffolk branch draws its employees from the Suffolk and Nansemond County labor market[1] and the Portsmouth branch from the Portsmouth and Portsmouth-Norfolk labor market.[2] It was the long-established procedures of the defendant to require written applications for employment. These applications inquired into the applicant's health, his or her previous banking experience, any special skills or business-machine experience, education, employment record and personal references. They provided no information on the applicant's race. The branches were only required to retain the applications for at least six months. Both branches followed the practice of hiring only as a vacancy developed. In filling the vacancies the bank would normally review the applications filed within the six months prior to the date of the vacancy, select one or more applicants for interview, and, after the interview, would make its choice. Each branch had its own interviewing officer for employment applicants. In passing on the applications the branch would normally not employ without its labor market and would give some preference to the proximity of an applicant's residence to the branch where he or she was to be employed.

When the trial actually began, the parties stated their respective claims either for relief or by way of defense. Counsel for the EEOC began his presentation of his claim by asking rhetorically "what are we required to do" to make out a prima facie

[11] The use of Nansemond County as a labor source in establishing the relevant labor pool is, in my opinion contrary to recent precedent both of this and other circuits. The proper standard for establishing the labor market in this context is derived from an applicant flow analysis. We, in effect, held this in *United States* v. *Fairfax County*, 629 F.2d 932, 940 (4th Cir. 1980). In rejecting SMSA statistics in favor of applicant flow data, we said:

> "At the outset, we note that applicant data are normally highly relevant evidence of an employer's labor market. See, *Hazelwood School District* v. *United States*, 433 U.S. at 308 n.13, 97 S.Ct. at 2741. Those who apply constitute the pool from which employees are selected."

The same rule was stated by the Fifth Circuit in *Markey* v. *Tenneco Oil Co.*, 635 F.2d 497, 500-501 (5th Cir. 1981), where the Court suggested that, in determining the relevant labor pool, it was appropriate to

> "assign a statistical weight to the percentage of blacks in each parish [the employment area] based on that parish's contribution to the applicant pool. Absent discriminatory recruiting practices, the percentage of applicants from a particular parish may be probative of the willingness of individuals in that parish to travel to the Tenneco plant and of the relative accessibility of the plant to residents of the parish, and thus be a more accurate measure of that parish's contribution to Tenneco's labor pool. The trial court should, of course, consider any evidence that helps define the areas from which Tenneco would normally be expected to draw its employees."

If we apply this standard, Nansemond County should be eliminated from the relevant labor pool and Suffolk should be treated as the sole source. Thus, the undisputed evidence establishes: Of the alleged discriminatees at the Suffolk branch, all were residents of Suffolk. Again, in the EEOC listing of black applicants denied employment discriminatorily in its answers to interrogatories, every applicant was at the time a resident of Suffolk. (See Appendix pp. 1660-1661) The record does not list a single applicant at Suffolk who lived in Nansemond County. The use of Nansemond County as a source of employment applicants is accordingly unsupported by the record and the proper labor pool, if we apply as we should applicant flow, in Suffolk.

[12] But two of the Portsmouth applicants identified by the EEOC as alleged discriminatees lived elsewhere than in Portsmouth at the time. One of these lived at Chesapeake; the other who lived at Virginia Beach applied for a job as a manager and was not interested in a office/clerical job. Thus, the use of the Norfolk area as a labor pool for employment by the bank at the Portsmouth branch, also, seems unjustified for the same reason stated in Note 11.

case, and then answered his own inquiry by declaring that he (meaning the plaintiff EEOC) "was required to show that an individual who applied for a job was black. . .[was] qualified. . . that a vacancy existed and [was] rejected." When that proof had been adduced and a prima facie case was thereby made out, EEOC counsel proceeded: "The burden then shifts to the defendant to come forth and show your Honor, based upon valid business reasons, why these individuals were not considered; in fact, were rejected."[13] Having so stated the defendant's burden, counsel for the EEOC at this point offered the firm opinion that the defendant would be unable to meet this burden and that, because of such failure, "[t]he only conclusion, under these circumstances, . . . is that race was a factor" in the defendant's hiring decisions and a decree in its favor was in order on behalf of all claimants.[14]

The EEOC's proof at the trial followed precisely the scenario thus laid out by its counsel at the commencement of the trial. In its live testimony following this statement by its counsel of its

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[13] The burden in such a case is not one of "convincing" but only one to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Dept. of Community Affairs* v. *Burdine*, _____ U.S. _____, (decided March 4, 1981), Slip Opinion p. 9.

For a recent restatement of this, as it applies particularly to statistical evidence, see the remand of *Johnson* v. *Uncle Ben's Inc.*, 628 F.2d 419 (5th Cir. 1980), by the Supreme Court for reconsideration in the light of *Burdine*, 49 L.W. 3787, April 21, 1981.

[14] Counsel for the EEOC in this outline of his theory of the case was making a statement of the classical disparate treatment formula of *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973). Implicit in it was the recognition on the part of the EEOC that ultimately and finally in this case, with its small number of hiring decisions involved over a substantial span of time and with the number of potential discriminatees specifically identified, no real pattern or practice of discrimination could be established unless the EEOC was able to prove that all or at least a substantial number of the hiring decisions made by the defendant were racially tainted by the refusal to hire one or more of the potential discriminatees. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977).

theory of the case, the EEOC began by developing in painstaking fashion the procedure followed by it in its investigation of alleged discrimination on the part of the defendant. It first secured and reviewed all employment applications at the Suffolk branch for the entire relevant period (*i.e.*, 1969 to 1975) and all employment applications at the Portsmouth branch for the years 1973-1975, inclusive. After identifying all the black applicants on these lists, the EEOC, through its representatives, sought to communicate with them suggesting that they might have a claim of discrimination against the defendant and a right to backpay, and requesting information from them relative to their claims. The EEOC took the replies it received and proceeded to identify all those made within six months of any employment decision by the bank at the relevant branch. It did this because the undisputed and agreed practice of the bank, as we have seen, was to consider only applications filed within six months of the time when a vacancy arose. If a white was employed at any time when there was a qualified black applicant or applicants with an application pending within the preceding six months' period, then that black applicant or those applicants were treated by the Commission as potential discriminatees. In this manner the 51 discriminatees asserted by the Commission were, according to the EEOC's testimony, identified by the EEOC through its witness, a paralegal with seven years' experience in this type of work. On the basis of this identification the EEOC stipulated that the 51 individuals so identified represented the only potential discriminatees in this action. The EEOC then proceeded to offer proof of its investigation to establish exactly the amount due each of such discriminatees by way of backpay and the result of this investigation was offered as proof of the amount of backpay due each claimant. The Commission followed up with the tesitmony of some 34 of the individual claimants. These claimants gave the circumstances on which they based their claims of discrimination.

Contrary to the expectations of the Commission's counsel, the bank, not only impeached the statistical evidence of the

Commission, but it did, at the conclusion of the Commission's case, accept the burden of production, as declared in *Texas Dept. of Community Affairs* v. *Burdine*, _____U.S._____, (decided March 4, 1981), and did "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decisions (in connection with every potential discriminatory claim) had not been motivated by discriminatory animus." In fact, the bank went beyond this burden in connection with every employment decision in the relevant category for the period in question. The bank offered extensive proof in support of its failure to employ all the alleged discriminatees who had testified at trial. The bank, however, did not content itself merely with producing evidence in support of its decision in connection with the claims of the alleged discriminatees who had testifed but adduced evidence which was found by the district court to be sufficient to support a rational conclusion "that the employment decision[s] [in all the other cases as well] had not been motivated by discriminatory animus." Thus, the defendant contested with proof the Commission's claim of discrimination in favor of every one of the named 51 alleged discriminatees and, as I later point out, the district court found that the defendant had not engaged in racial discrimination in failing to employ any one of the 51 alleged discriminatees. The bank, also, introduced evidence of its affirmative action program for minority employment which it had adopted in 1973, and had since implemented with the approval of the Department of Labor, to whom jurisdiction over such programs was assigned under the Government Contract Compliance Executive Order. Finally, it impeached the statistical proof by subjecting it to the standard *Castaneda* test[15] and asserted it failed in proof of discrimination under such test.

At this point it seems appropriate to mark out precisely the conclusions reached on this record in the district court's opinion dismissing the action and the reasoning of the majority opinion reversing the district court and ordering exclusive relief in favor of

[15] *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

the plaintiff, along with my own statement of my views which differ from those of the district court and those stated in the majority opinion. After finding that the action properly only embraced hiring decisions at the Suffolk branch, the district court proceeded, however, to consider the discrimination charge as it affected separately first the Suffolk branch and then the Portsmouth branch since the EEOC sought to present in this action its claim against the Portsmouth branch. It held at the outset that solely on the basis of the EEOC's statistical evidence of hirings in the two agreed work-force categories at the two branches, compared both with the overall black work force and with the qualified black work force in the specific categories involved in the action, the EEOC had made out a prima facie case. It then undertook to determine whether the defendant had rebutted or overcome both the prima facie case resting on inferences drawn from the statistical evidence and the additional nonstatistical evidence offered by the EEOC, which related to the 51 claims of individual discrimination and to the defendant's hiring practices. It found that, when tested by the standard deviation test developed in *Castaneda*, the statistical evidence was not sufficient to support a reasonable hypothesis of discrimination and the prima facie finding, based on the raw statistical data, was thus neutralized as proof of discriminatory motive or intent. It then reviewed carefully the applicant flow evidence, found it reasonably reliable, and, after evaluating all the evidence on the 51 claims of individual discrimination identified by the EEOC, found as a fact that in no case did the evidence support a finding of discrimination. Finally, it reviewed the defendant's hiring practices and found, again as a fact, that none was discriminatory. It accordingly dismissed the complaint. Thus, the district court found (a) that the statistical evidence was, when tested by the *Castaneda* standard, neutral in the probability of discrimination in hiring, (b) that there was, as a matter of fact, no discrimination on the part of the defendant in failure to hire any one of the 51 alleged discriminatees, who, by stipulation of the parties, were "the only

[possible] potential discriminatees" out of the black applicants for employment at either branch of the defendant for the relevant time periods, and (c) that the defendant had engaged in no hiring practice that resulted in discrimination in the relevant time period.

The majority opinion agrees with "the district court's ruling that the EEOC's statistical proof made out a prima facie case of discrimination" but found that the district court "erred in holding that defendant's rebuttal evidence was sufficient to overcome the prima facie case."[16] As a basis for this latter finding, the majority opinion states that "the district court's analysis of the evidence [by which it concluded that the defendant had met successfully the EEOC's prima facie case] was flawed by specific failures correctly to apprehend or to apply controlling legal principles developed by the Supreme Court for analyzing the evidence in this type of case." It identified these flaws as" (1) the weight apparently assigned by the [district] court to a standard deviation analysis of certain of the statistical evidence;. . .(2) the significance which the [district] court assigned to ANB's applicant flow statistics as rebutting evidence; and (3) in the way in which the [district] court treated the relationship between the statistical and nonstatistical evidence offered to prove the discriminatory pattern or practice charged."

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[16] The majority, I submit, indicates in this sentence, fatal misunderstanding of the burdens on the respective parties in the *McDonnell Douglas* context. When the plaintiff in a *McDonnell Douglas* type case makes out a prima facie case, the burden on the defendant is merely to produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, p. 6, slip opinion. The burden of the plaintiff then is "to demonstrate that the proffered reasons was not the true reason for the employment decision" and that burden then "merges with the ultimate burden of persuading [a burden which rests on the plaintiff throughout the trial] the court that she has been the victim of intentional discrimination." *Id.* p. 7, slip opinion; see also the Supreme Court's remand of *Johnson* v. *Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980), 49 L.W. 3787.

Although these flaws would appear to be largely errors in the weight or significance to be assigned to the evidence, the majority opinion treats them as "errors of law" and thus not subject to the clear error rule for appellate review. It did this by concluding that in the case of the statistical evidence the district court gave improper weight to the standard deviation test, and that, in weighing the nonstatistical evidence, the district court failed to give proper consideration to the "coloring" which the statistical evidence gave to the nonstatistical evidence.

At the outset, I differ with both the district court and the majority opinions in their conclusion that on the statistical evidence alone the EEOC had proved a prima facie case. I think that the application of the standard deviation test as declared in *Castaneda*, which was unquestionably required in evaluating the statistical evidence in considering whether the EEOC had made out a prima facie case on the basis of such statistical evidence alone,[17] demonstrates that the statistical evidence relied on both by the district court and by the majority was insufficient to make out a prima facie case of discrimination, but, more than that, if the statistical evidence, though not refined by the use of the standard deviation test, could be regarded as making out a prima facie case (which I dispute),such a statistical prima facie case was, as the district court found, rebutted by the standard deviation test, the applicant-flow proof, the complete rebuttal of the 51 individual claims of discrimination, and the express findings with respect to the defendant's hiring practices. Specifically, I would find no flaw in the use of the standard deviation test by the district court, in the district court's factual finding of the reliability of the defendant's applicant-flow data, or in its findings on the individual claims of discrimination or on the defendant's hiring practices. Finally,

[17] See *Hazelwood*, *supra*, 433 U.S. at 308 n 14:

> "A precise method of measuring the significance of such statistical disparities [between qualified work force and hirings] was explained in *Castaneda* v. *Partida*, 430 U.S. 482, 496-497 n.17. . . .It involves calculation of the 'standard deviation' as a measure of predicted fluctuations from the expected value of a sample."

unlike the majority, I conceive of all these findings as findings of fact and not as "legal errors," as analyses and weighing of the evidence, reversible only for clear error.

I first address the finding by the district court and the majority that solely on the statistical evidence the EEOC had made out a prima facie case. The statistical evidence relied on for this finding consisted of two comparisons: One based on general work force statistics comparing the percentage of blacks in the general work force in the pertinent labor market of each branch with that of blacks hired by the defendant at such branch in the period 1969-75 and the other using the percentage of qualified blacks in the two labor categories involved in the charge for the pertinent labor market of each branch for the period 1969-75. Both the district court and the majority discarded the first comparison[18] and "rel[ied] only on the specialized work figures." On the basis of these "specialized work figures," they found that blacks were so "grossly underrepresented" as to make out a prima facie case. In arriving at this conclusion for purposes of determining whether a prima facie case was made out, neither looked to the standard deviation test enunciated in *Castaneda* but looked to the record of hirings, particularly in the Suffolk branch in the office/clerical

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[18] For an interesting comment in this regard, see Lerner, Employment Discrimination: Adverse Impact, Validity, and Equality, Supreme Court Review (1979) 17 at 32-33:

> "The inappropriateness of comparisons between the racial makeup of the general population and that of an employer's work force is evidenced by the obvious fact that general population figures count children equally with adults, and few children have the strength, skill, and attention span needed to drive heavy trucks. In more general terms, as long as we have child labor laws, general population figures will always produce gross overestimates in the labor force of any area. To dismiss this fact in making group comparisons as if the error were a constant one is simply wrong. We know that the ratio of children to adults differs markedly in different groups at different times and places, as does the ratio of older, retired people to active adults. As a result, the overestimation will often be significantly greater for some groups than for others."

classification.[19] They noted that the percentage of blacks available in this category for Suffolk was 10.3% and for Nansemond County 22.5%, or an average of 16.4%. The majority then declares that "during three of the charge years (1969, 1974, 1975) there were no blacks employed in these categories [*i.e.*, the office/clerical category]. In two years (1970, 1973), there was one black, and in two years (1971, 1972) there were two." This was the basis for the finding by both the district court and by the majority opinion of gross underrepresentation of blacks.

As a matter of fact, these figures on employment as used by the majority as a basis for its concurrence in the district court's finding of a prima facie case are inadequate in themselves to make out a prima facie case. In 1969 the EEOC's own undisputed evidence shows that there were five persons hired at the Suffolk branch in the office/clerical category, one of whom was a black (Beulah Chambers, hired on November 17, 1969).[20] In effect, then, 20% of all hirees in this category at the Suffolk branch during 1969 were black. This percentage is twice the representation of blacks in the qualified Suffolk work force, considerably more than the average of both Suffolk and Nansemond County qualified work force statistics for the category (16.4%), and just under the qualified work force statistics for Nansemond County alone.[21] Again, in both the years 1974 and 1975 the records included in the evidence by the EEOC show that, out of seven persons employed in the office/clerical category during those years, there

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[19] I confine my discussion to the office/clerical category because, as I have already noted, the majority concedes there is insufficient evidence to sustain a finding of hiring discrimination in the officer/manager classification for the relevant period.

[20] See EEOC's Exhibit #41, set forth at page 1561 of the Appendix. This fact is confirmed in EEOC's report of investigation where it states 5 persons were employed in this category, one of whom was black. Incidentally, this was the only investigation, limited as it was basically to the year 1969, made by the EEOC before it filed its suit.

[21] See note 9.

was included at least one black hiree in each year.[22] The percentage of blacks hired in this category in those two years was thus approximately 14%. The majority would seemingly discredit the hirings in 1971 and 1972, saying there were but two blacks hired in those two years. That is true, but in 1971, there were only two applicants hired in this category and one of these was black, for a percentage of 50%, and in 1972 there was one black hired out of five persons employed in this office/clerical category, for a percentage of 20% black. It is thus seen that, for three of the seven years in question, the percentage of the defendant's hiring in the office/clerical category at the Suffolk branch exceeded considerably the percentage of qualified blacks in that category both in the Suffolk and in the Nansemond County labor markets, and in two of the other four years, the percentage of hirings considerably exceeded the percentage of qualified blacks in the Suffolk labor market and was within two percentage points of the percentage of qualified blacks in the Nansemond County labor market.[23] If, on the other hand, we compare the total number of hirees in the office/clerical category with the black hirees in this category for the full period of 1969 through 1975 at the Suffolk branch, but approximately 2 percentage points less than the average of qualified blacks in the combined Suffolk and Nansemond County labor markets. For the Portsmouth branch we have hiring figures only for the years 1973, 1974, and 1975. In these three years the average percentage of black hirees in relation

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[22] The black hiree in 1974 was Gwen Bethea and in 1975 Karen Estes.

[23] In looking at the Nansemond County figures, we must remember that it was the admitted policy of the bank to favor those applicants living near the branch (a practice which would work against employment from Nansemond County) and apparently Nansemond County individuals were not attracted to apply at the Suffolk branch. This latter fact is evident from the fact that, of the 51 discriminatees charged to have been discriminated against, not one who applied at the Suffolk branch was from Nansemond County. The use of Nansemond County statistics, in evaluating employment at the Suffolk branch, is at best of minimal value.

to overall hiring in the pertinent classifications was 15.2%, which did not represent any "gross underrepresentation" by any standard. These sporadic, spotty figures in hiring, in both of the pertinent classifications, spread as they are over seven years, and varying markedly from year to year, certainly evidence no clear-cut pattern or practice, "no standard operating procedures"[21] of discrimination against blacks, (the required finding under *Teamsters*) and they cannot support a finding of "gross underrepresentation," which could be the basis for a finding of a prima facie case of discrimination on the part of the defendant, either at the Suffolk or at the Portsmouth branch.

But, apart from the complete inadequacy of even the evidence on which the district court and the majority sought to ground their finding of a prima facie case of a "standard practice" of discrimination in hiring, I think that the majority sought to deduce a prima facie case from statistical evidence, which necessarily involves an element of intent, in the wrong way and by disregarding the test established by the Supreme Court and followed by us in *United Bank* for such deduction. Intent is an essential element in a disparate treatment case. Manifestly, whenever, as here, a court seeks to determine whether a hiring selection by an employer is racially tainted by a statistical comparison of hirings with available qualified work force in the labor market, it does not ordinarily do so on the basis of evidence of express intent or motive. Statistics do not provide expressly such evidence. One must resort to the law of probabilities in assessing such statistics for purposes of arriving at a possibly reasonable inference of discriminatory intent. Under the law of

[21] Similarly there is no difference either between the district court and the majority, or between the majority and myself, over the agreed legal rule applicable to this claim. The EEOC must prove, in order to establish a claim of discriminatory practice in hiring, more than "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" in hiring; it must prove that racial discrimination in such hiring over the period in the two classifications in issue was "the standard operating procedure" of the defendant. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977).

probabilities, it is not sufficient for a finding of an inference of tainted motive that the percentage of hirings does not correspond exactly with the percentage of qualified blacks in the work force in the pertinent labor market; it is only when the deviation from the norm reaches such a level that it is reasonable to assume or hypothesize that the hiring was biased or intentional, rather than by chance or at random, that it becomes supportive of a prima facie case of discrimination. The Supreme Court recognized this and in *Castaneda* provided courts with what it characterizes as "precise" test or forumula for ascertaining when the deviation reaches this level and may be sufficient to justify a hypothesis of intent or bias in the hiring process.[25] In arriving at such formula, on the basis of the mathematics of probabilities it declared that when the deviation provided by the statistical comparison is "greater than two or three. . .then the hypothesis" that defendant hired employees without regard to race "would be suspect,"[26] to such an extent that it was not unfair to assume that the hiring selection was tainted. In essence, what the court was saying was that until the deviation reached the level of "more than two or three," statistics based on a comparison of hirings with qualified work force would not render those hirings "suspect" of racial discrimination.

In reaching their determination that the EEOC had established a prima facie case solely on the statistical evidence, both the district court erred and the majority departed from the rule established by *Castaneda* and adopted by us in *United Bank* for qualifying statistical evidence in this context. The district court did it is true later apply the *Castaneda* standard in determining whether the statistics, when tested by the *Castaneda* rule, rebutted the prima facie finding. In so doing it determined that the deviations in this case, taken over the full period in both categories, were not "more than two or three." It concluded that

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[25] See note 17.

[26] 430 U.S. at 497 n. 17

such determination "neutralized" the value of the statistics as proof of a tainted hiring practice and as a basis for a hypothesis of bias in the hiring process. I agree with the district court in its calculations under the *Castaneda* rule, as I assume the majority does at least, it does not express disagreement. My difference with the district court is its failure to use the *Castaneda* test in determining whether the EEOC had made out a prima facie case with statistical evidence which was "neutral" in providing authority for a hypothesis of intent. In taking this position, I am following precisely what the panel did in *United Bank*, 615 F.2d 14, and what the Supreme Court in *Castaneda*, 430 U.S. 482, and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), directed us to do.

If, however, we are to apply the *Castaneda* test by way of rebuttal, as did the district court, I agree with the district court's conclusion that the deviation in this case in the statistical evidence was not sufficient to render the hiring selections of the defendant "suspect" of bias. Under those circumstances, the district court correctly held that the statistical evidence was "neutralized" as evidence of bias in the hiring selection and, if bias was an essential element of the plaintiff's case, as the plaintiff itself concedes, it was necessary for the Commission to produce evidence of it elsewhere in the record, for, as we have seen, it is the Commission's burden to persuade throughout the case under *Burdine*. The majority, however, takes issue with this conclusion. As I read it, the majority opinion does not find fault with the district court's finding that the standard deviation reflected in the statistical evidence for the two pertinent employment categories was not "more than two or three." It contends rather that the district court committed "legal error" in the neutral effect given by it to a finding that the standard deviation in the statistical evidence was no "more than two or three." This is one of the three "specific failures. . .to apply controlling legal principles developed by the Supreme Court for analyzing the evidence in this type of case" found to have flawed the district court's opinion.

The majority opinion faults the district court on this point because that Court held that, under *Castaneda*, "if standard deviations reflected in static work force statistics were not 'more than two or three' the disparities were necessarily shown to be statistically insignificant." (emphasis added) It asserts flatly that this statement "is simply incorrect." The statement of the majority is not, however, a strictly accurate reading of the conclusion which the district court said should be drawn from a standard deviation of "not more than two or three." What the district court did conclude was that, when the standard deviation in the employee selection was more than "two or three," it was a fair hypothesis, based on accepted standards of mathematical probabilities, that the selection whereby blacks were not hired was "suspect" and not by chance but, conversely, that if the standard deviation in such a situation was no "more than two or three," there was no basis for a hypothesis that the selection was by design rather than by chance. In essence, the conclusion was that, if the deviation was no "more than two or three," that fact would not permit a hypothesis of bias or design as distinguished from chance and would be purely a neutral indicator insufficient to satisfy the plaintiff's burden of persuasion, which as *Teamsters* teaches, goes with the plaintiff in a discrimination case throughout the proceedings.[27] That I think is a reading clearly justified by *Castaneda* and it was in effect the reading given *Castaneda* in *United Bank*, 615 F.2d at 152. Moreover, it is not substantially different from the construction of *Castaneda* arrived at in the majority opinion itself to the effect "that courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three."

In my opinion, *Castaneda* begins with the premise -- a premise reaffirmed recently in *Burdine, supra* -- that the burden of persuasion in a discrimination case rests throughout the case, both in establishing a prima facie case and in sustaining a judgment of

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[27] This accords with what was said in *Teamsters, supra*, 431 U.S. at 336.

final liability, upon him who asserts discrimination.[28] When the complainant relies as a basis for sustaining this burden on statistical evidence, that evidence is to be tested by rules of statistical probability.[29] Until the statistics measured by these rules of probability, as stated in *Castaneda* reach a point of deviation in their application that will support a hypothesis of bias in hiring, promotion, etc., the plaintiff has not met this burden of persuasion and the defendant is entitled to prevail. *Castaneda* establishes this threshold point where a hypothetical construct of bias is warranted as a standard deviation of "more than two or three." When the standard deviation fails to reach that level of "more than two or three," the plaintiff, so far as his statistical proof is concerned, has not sustained his burden of persuasion and has not met the threshold test for a prima facie case based on statistical evidence. That was the situation here. Under that construction, the EEOC had unquestionably failed to satisfy the requirements for a prima facie case on the basis of the statistical evidence.

I would assume the majority does not suggest a court might hypothesize when the deviation is no "more than two or three" that the employer's selection of hirees was by design, *i.e.*, was discriminatory. To do that would be to give the same weight to a standard deviation of no "more than two or three," as *Castaneda* says should be given to a standard deviation of "more than two or three," and I am confident that the majority does not opt for any such misapplication of *Castaneda*. I can only assume that the majority means that the "weight" to be given a finding of no

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[28] See also *Teamsters*, *supra*, 431 U.S. at 336.

[29] In Note, Title VII -- Employment Discrimination -- Use of Demographic Statistics as Prima Facie Evidence of Discrimination, 25 N.Y.L.S.L. Rev. 759, 578 (1980), the commentator said:

> "In essence, the utility of statistics in Title VII actions is based upon the frequency theory of probability."

See also, Braun, Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases, 32 Hastings L.J. 59, 69-70 (1980).

"more than two or three" is that such a finding does not support a hypothesis of selection in hiring either by design or by chance. Such a finding authorizes an assumption neither of discrimination nor of non-discrimination, specifically, that the finding in such a case is inconclusive, supportive of neither a hypothesis of design nor of chance. If this is the view of the majority, the district court adopted that view and I can find no reason for the majority to fault it as the first "flaw" which it finds "skewed" the district court's conclusions. The very test or formula articulated by the majority (*i.e.*, "that courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three") unquestionably justified the district court saying that such neutralization of the statistical evidence meant simply that the statistical evidence was without value in determining discrimination, either prima facie or substantively. Is not such a finding evidence that the district court, in its review of the statistical evidence was being "extemely cautious" in drawing any conclusions from the flawed statistical evidence, and has not the majority trespassed far beyond appellate review and abandoned its own rule of "extemely cautious" in evaluating the statistical evidence, giving it in effect conclusive effect?

The best evidence of discrimination or no discrimination in this case does not, however, consist of probability of inferences drawn from what are clearly neutral statistics but of the defendant's actual employment decisions themselves, analyzed under a proper applicant flow standard. Statistics support inferences but only inferences which, under appropriate circumstances may support a judgment of discrimination if no attempt at rebuttal is made.[50] But -- and this is the important point -- statistics, with their inferences, cannot stand against proof that an employer never engaged in discrimination in a single employment decision in the relevant time period, when reviewed in the light of the available applicant flow.[51] This positive proof that no employment decision was tainted is "the proof of the pudding" in the establishment of

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[50] *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, slip opinion pp. 5, 6.

no discrimination and it completely nullifies any inference sought to be drawn from statistical evidence. This point was made clear in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). In that case where the plaintiff in a discrimination case, relied on statistical compilations for the claim, the Supreme Court remanded with the direction "on remand to determine whether sufficiently reliable applicant flow-data are available to permit consideration of the petitioners' argument that those data may undercut a statistical analysis dependent upon hiring alone." 433 U.S. at 313 n.21. In concurring, Justice Brennan agreed upon remand so that "Hazelwood reasonably should be given the opportunity to come forward with more focused and specific applicant-flow data in the hope of answering the Government's prima facie case. *Id.* at 314. Justice White, also concurring, was even more emphatic, suggesting that the Government in a discrimination case, should itself as a part of its prima facie showing submit applicant flow evidence. Thus, he said (*Id.* at 347-48):

> "Since the issue is whether Hazelwood discriminated against blacks in hiring after Title VII became applicable to it in 1972, perhaps the Government should have looked initially to Hazelwood's hiring practices in the 1972-73 and 1973-1974 academic years with respect to the available applicant pool, rather than to history and to comparative work-force statistics from other school districts. Indeed, there is evidence in the record suggesting that Hazelwood, with a black enrollment of only 2%, hired a higher percentage of black applicants than of white applicants for these two years. The Court's opinion of course permits Hazelwood to

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[11] The applicant flow can, of course, be tainted if the employer has, by its conduct, discouraged black applicants in the relevant labor market from applying. There is no contention by the Commission and no finding by either the district court or by the majority here that the defendant engaged in such conduct.

> introduce applicant pool data on remand in order to rebut the prima facie case of a discriminatory pattern or practice. This may be the only fair and realistic allocation of the evidence burden, but arguably the United States should have been required to adduce evidence as to the applicant pool before it was entitled to its prima facie presumption." (Italics added)

And in *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 586 (1979), the Supreme Court emphasized the superior reliability in the discrimination context of reliable applicant flow data over purely statistical evidence generating a mere inference of discrimination. In that case, the Authority had a policy of excluding from employment and of discharging persons receiving methadone maintenance. The statistical record established that practically all the persons receiving such maintenance were either black or Hispanic. The plaintiffs, who were black and on methadone, claimed the policy constituted racial discrimination. To support that claim, the plaintiffs relied on the disparity as shown statistically between blacks and Hispanics, on the one hand, and whites, on the other, as evidencing racial discrimination. In denying pertinence to such statistics and in pointing to applicant flow as providing the proper test, the Supreme Court said (pp. 585-86):

> "We do not know, however, how many of these persons ever worked or sought to work for TA. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs for over a year -- the only class improperly excluded by TA's policy under the District Court's analysis."[12]

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[12] For a comment on *Beazer*, see, Note, Title VII -- Employment Discrimination -- Use of Demographic Statistics as Prima Facie Evidence of Discrimination, 25 N.Y.L.S.L. Rev. 759 (1980).

We followed the same rule of relying on applicant flow data as a refutation of any claim of discrimination in *EEOC* v. *United Virginia Bank/Seaboard National*, 615 F.2d 147 (4th Cir. 1980). A majority of the court in that case followed the reasoning of Justice White in *Hazelwood* and looked to such data in determining whether the Commission had made out a prima facie case; Judge Butzner concurred but did so on the ground that the applicant-flow data rebutted absolutely what he considered to be the Commission's prima facie case, which was based wholly on statistics. Under either view, the applicant flow data were found to overcome any claim of discrimination based on an inference arising out of statistical evidence. And the reason for such conclusion is quite obvious. If, after reviewing the applicant flow data in relation with all hiring decisions, no discriminatory refusal to hire is found, there manifestly can be no basis for a discrimination claim.

Perhaps because it recognized the force of Justice White's concurring opinion, the Commission in this case attempted to establish discrimination both prima facie and substantively by testimony of applicant flow data. The bank offered its rebutting testimony. On the basis of all the evidence, most of which consisted of live testimony, the district judge found that not a single hiring decision of the defendant during the relevant period was tainted by racial bias nor had a single one of the 51 persons who the Commission asserted were the "only potential" discriminatees among those who applied for employment in the pertinent classification for the relevant time period had actually been denied employment because of his or her race. Such a finding was one of fact and reversible only for clear error. The majority does not seek to address the district court's findings on this point for clear error, obviously because such a holding was not reversible. Rather, it somewhat ambiguously faults the district court's finding in this area because of "the significance" (which I assume is synonymous with "weight") given this evidence by the district court. The majority rests this criticism of the district

court's finding on three grounds: First, the applicant flow data for the Suffolk branch is incomplete; second, the applicant flow data for the Portsmouth branch covers but three of the relevant years; and, third, the applicant flow data are flawed at both branches by the inclusion therein of service worker employment. Except in these three situations, there is no attack on the reliability or trustworthiness of this applicant flow data.

The first objection raised by the majority opinion to the use of applicant flow data is its conclusion that the applicant flow figures for the Suffolk branch were incomplete. This same point was advanced in the district court by the EEOC and that court, after carefully reviewing the evidence, concluded that the figures were "reliable." Though this was plainly a finding of fact by the trial court and though such finding was not clearly erroneous,[*] the majority would fault the finding as an error of law. The record, however, abundantly sustains the factual finding on this point made by the district court. As a matter of fact, the applicant flow data on which the district court relied for its finding were largely developed in the testimony of witnesses for the EEOC and in fact stand undisputed.

Ms. Stephens, a paralegal employed by the EEOC, was directed by the EEOC to determine whether any individual blacks had been discriminated against and who they were. To do this she obtained and reviewed all the applications for employment at the Suffolk branch for the years 1969-75. The majority, however, questions that Ms. Stephens had access to or reviewed all the applications for employment for such period. It points to the language in the stipulation of facts, which states that, "[a]fter a review of the available applications filed with American National Bank in Suffolk from 1969 through 1975 and in Portsmouth during 1975. . . ." it attaches special meaning to the adjective "available" and suggests that "it seems highly unlikely on the

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[*] Such a factual finding by the trial court may only be reversed for clear error. Such was the standard followed in *Burdine*, slip opinion p. 3, and in *Danzl* v. *N. St. Paul, etc. School District*, 642 F.2d 1109, 1114 (8th Cir. 1981).

record we review that this data represents substantially all the applicant flow data for the years in question." It offers as a basis for this only that the district court had noted that "the total number of applications reflected in the data offered the court varied widely from year to year, from a low of sixteen in 1972 to a high of ninety-seven in 1974." From this single observation of the district court the majority made its finding that the employment applications were incomplete. And this is, I submit, contrary to the testimony of Ms. Stephens.

In its note 47, the district court discussed Ms. Stephens' testimony. In the course of her testimony, she was interrogated on the applications she had reviewed for the Suffolk branch. The district court indicated its unwillingness to admit in evidence the EEOC's exhibit prepared on the basis of her review unless it covered all the employment applications for the pertinent years at the Suffolk branch. After some sparring, the witness affirmed that her exhibit covered all the applications. Moreover, during the colloquy at that time, counsel for the EEOC stated: "We believe it [the proffered exhibit] reflects those applicants, the total applicants, and the percentage of black applicants for the years 1969 through 1975". (Emphasis in text) The figures in the exhibit are consistent with the defendant's compilation of the number of applications filed at the Suffolk branch for the pertinent years. In the face of this evidence, and in the absence of any contrary evidence by the EEOC, the district court found the figures used by the defendant in its applicant flow presentation for the Suffolk branch were reasonably accurate. In the absence of some basis for a conclusion that such finding was clearly erroneous, that factual finding is binding on this appeal.

The second objection of the majority to the applicant flow data relates solely to the Portsmouth branch. That branch had employment applications for no years behind 1973. The uncontradicted evidence, as incorporated in the stipulation of the parties, was that as a general rule the defendant did not retain employment applications for more than six months. This was

because of its practice that in filling a vacancy, it did not go back further than six months in its review of applications. The district court found this a reasonable practice, and one that the defendant generally followed, and, so far as I read it, the majority does not take issue with such finding. In 1970 the EEOC had told the defendant that, though it was investigating an employment claim involving the Suffolk branch, it was not interested in the Portsmouth branch and did not wish to review the records at such branch.

Not only had the Commission thus assured the bank that the Portsmouth branch was not involved in any charge of discrimination, but also there was another circumstance which was calculated to assure the bank that, with the possible exception of the dormant charges of Chambers against the Suffolk branch, the bank was in full compliance with the Act. In 1973, the Office of Federal Contract Compliance, Department of the Treasury, acting under the authority of Executive Order 11,246,[14] as amended by Executive Orders 11,478 and 12,086, had reviewed the affirmative action program developed by the defendant, as well as its hiring practices. That review resulted in the approval of the defendant's affirmative action program at both branches as well as of its hiring practices.[15] We repeat: until the EEOC filed its complaint in 1976, there had thus not been the slightest intimation by the EEOC or any other agency of the Government, such as the Department of Labor, having responsibility in the area of discrimination in hiring or employment practices, that either

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[14] The program under the Executive Order is described in Note, 31 A.L.R.Fed. 1800. The actual orders are set forth as a note to 42 U.S.C. § 2000a.

[15] EEOC's witness Emile Cardiel testified that the report of the "Compliance Review of American National Bank," dated September 27th, 1973, based on an investigation of the defendant's hiring policies at its offices, "that the Government was satisfied with the bank's affirmative program and with its hiring policies." He later added the report stated, "that everything was all right," so far as the defendant's hiring policies or practices were concerned.

the EEOC or the Department of Labor, under its Executive Order authority, had any intention of charging discrmination at its Portsmouth branch. Actually, so far as the record shows, the EEOC had never received a complaint from any one about that branch and obviously it had never made any investigation of employment at that branch.

The injection of the Portsmouth branch into the action more than six years after the EEOC had notified the defendant it had no interest in employment at the Portsmouth branch undoubtedly came as a shock to the defendant. Until it was first notified that a charge of discrimination was being leveled against that branch, it had no particular reason to retain beyond six months any employment applications at the Portsmouth branch. I think the district court was fully justified in finding the action of the defendant in not retaining all its employment applications for the years 1969-75 at the Portsmouth branch was perfectly reasonable and in using the clear evidence of a want of discrimination in the years 1973-75 as a rebuttal of any claim of a practice of discrimination at the Portsmouth branch.

The majority, however, finds fault with this finding of the district court. It appears to suggest that the defendant may have destroyed the earlier records in order to conceal the true facts. There is nothing in the record to support such an inference. Indeed, the EEOC does not suggest such conduct on the defendant's part. Further, it seems to concede that there was no obligation on the defendant to retain these earlier applications at the Portsmouth branch. I say this because the majority appears to concede that "the affirmative obligation to preserve them [*i.e.*, the Portsmouth pre-'75 records] [had] expired." The majority intimates, however, that every employer ought to maintain all "employment records going back at least to the effective date of the Title [VII]" as a matter of "sound business judgment" which dictates "the maintenance of all business records having potential relevance in any of the litigation patterns to which businesses stand constantly exposed." It is difficult to think that any business

is obligated to retain from 1965 on indefinitely all its employment records if it wishes to avoid the inference that any destruction of such records is a self-serving concealment of damaging evidence against it. Businesses are already inundated with records they are required to keep. I do not think we should add to their burdens by saddling them with such inference from their failure to preserve such records.

The final conclusion by the majority that the defendant's applicant flow figures are flawed because they included the category of janitors will not stand examination. Such inclusion, the majority suggests, inflates the number of black hirees used in the statistical comparison. Actually, though, if we exclude black janitorial employees in the statistical comparison, there is no real change in the standard deviation. Thus, in the office/clerical category, there were 35 persons employed at the Suffolk branch between 1969 and 1975. Of these 5 were black, excluding the 2 black janitorial employees. Applying the standard deviation test to these figures, I find that, using the qualified work force in Suffolk, a standard deviation of 1.80; if we use Nansemond County statistics, a standard deviation of 2.63; and if we combine Suffolk and Nansemond County, a standard deviation of 2.21. This claim of error in the use of the applicant flow figures, even if sound (which I do not concede), is thus groundless. When the black janitorial employees are clearly excluded, the standard deviation is still well below the level of "more than two or three."

It is thus manifest beyond dispute that the district court was warranted in making its factual finding that the applicant flow data were "reliable" and, on the basis of such data, in finding that none of the bank's hiring decisions in the relevant period was racially tainted. And this conclusion cannot, I submit, be impeached by any inference erroneously deduced from "neutral" statistical data. After all, the applicant flow data are evidence which could be neither rebutted nor given a discriminatory "coloring" by this neutral statistical evidence.

I think the majority improperly fails to give proper, if not controlling, weight to the district court's finding of want of discrimination in the actual hiring decisions themselves in arriving at its conclusion that, on the entire record, the EEOC had made out factually a case of liability. I take it as well settled that a federal appellate court, such as we are, is a court of error whose function is limited to affirming, modifying, vacating, reversing or remanding for further proceedings upon a consideration of trial court error; it does not engage in equity review, giving right judgments upon the whole record, nor conduct de novo review with or without additional evidence. If, however, this view of our function is inaccurate and we may properly assume the fact-finding function of the trial court in what I submit is contrary to the proper scope of appellate review, then it is necessary to review all the evidence in reaching its findings of fact, and this would include the fact that not one black, identified by the EEOC, had been discriminated against by the defendant. The majority in effect disregards such evidence, particularly its complete refutation by the defendant, and never weighs it in reaching its conclusion.

I turn next to the nonstatistical evidence which the majority does notice and on which it rests in substantial part its decision. This evidence, such as it was, relates to alleged discriminatory hiring practices and procedures followed by the defendant. Manifestly, any such practices are unimportant if the Commission has failed to prove a single tainted employment decision in the relevant time period and this is just what the district court, after a review of the evidence, has found. Nor does the majority conclude that any of the employment procedures in and of themselves were racially motivated or used. It merely finds that evidence of such practice, while insufficient to prove taint, "tended to corroborate -- to some degree at least -- the prima facie showing of discrimination made by the static work force statistics." (Emphasis added) However, I think I have demonstrated already that the statistical evidence was "neutral" and that the applicant

flow data completely refute any possible "prima facie showing of discrimination made by the static work force statistics." But, beyond this, the charges of improper hiring practices themselves lack any force.

All allegations of hiring practices are of the "boiler-plate" variety made by the Commission indiscriminately in all cases, irrespective of how relevant such allegations may be in the particular case. The district court found that this was the situation in this case. It proceeded to underscore the fact that the EEOC made no effort at trial to prove that any of these practices resulted in any discrimination. The majority seems -- at least, in part -- to agree with this finding. Thus it joins the district court in condemning the EEOC's action in this case in making "irresponsible broadside" charges in its complaint and in failing "to follow up charges with attempted proof." It agrees with the district court in dismissing out of hand the bulk of all these "irresponsible broadside" charges.[16] It does seek to resurrect from the dust heap two practices, stated in the complaint, one being the use of an all-white interviewing staff and the other "word-of-mouth recruiting," and built some finding of discrimination on them. Accordingly, the majority declares that "rightly assessed, the EEOC's evidence of word-of-mouth recruiting as the primary means used by ANB to fill vacancies, and the use of an all-white interviewing staff to make its subjective hiring evaluations tended to corroborate -- to some degree at least -- the prima facie showing of discrimination made by the static work force statistics." (Emphasis added) This tentative finding cannot be sustained on the record, and, in a substantial way, the majority so concedes.

I shall first deal with the charge relating to white interviewing officers. The majority concedes that "it is clear that the use of an all-white interviewing staff standing alone could not support a determination of liability"[17] and states unequivocally that it could

[16] See note 18 majority opinion.

[17] This conclusion is in accord with the recent decision in *Heagney* v. *University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981).

not "quarrel with the court's related conclusions that the criteria used for selection [by the all-white interviewing staff] were for the most part objective and consistently applied." It is difficult to extract from these statements a basis for the majority's faulting the district court in finding that the practice of using an all-white interviewing staff was not employed for purposes of discrimination. This was exactly the same practice which was found in *United Bank* not to support a judgment in favor of the EEOC on a finding of discrimination. The charge relating to "word-of-mouth recruiting," on the other hand, really relates to the mere fact that in its application for employment the applicant was requested to list "friends or relatives employed by the bank." This, in the majority opinion's view, tainted the whole employment practice. To support this conclusion, the majority observes that "[t]hirty-two of the sixty-five applicants hired in Suffolk from 1969-75 and in Portsmouth in 1975 -- 49.2% had listed friends or relatives on their applications." The district court noted this same evidence. It found that no special significance was to be attached to this evidence, saying that "[i]f anything. . . statistics show[ed] that the listing of friends and relatives was a minor factor; a majority of the hirees had no 'contacts' working for defendant." This finding of the district court appears fully justified and even the majority practically so concedes for it adds that "controlling significance to this particular factor in the overall assessment of ANB's hiring practices" is not in order. In any event, the weighing of the evidence on this point was for the district court and its finding on the weight to be ascribed to it can only be disturbed for clear error.

The legal error which the district court committed and which faulted its findings of fact under the majority's reasoning was that, in reviewing the charges with reference to practices (which the majority implicitly concedes standing alone would not support a judgment against the defendant) the district court failed "to assess the evidence in the light of, and colored by, the gross underrepresentation of blacks in ANB's work force already

statistically demonstrated" and confined its "inquiry. . . to specific practices isolated from any inference of discrimination already established. It was in effect, as if the EEOC had sought to base its case solely upon the nonstatistical evidence relating to hiring." The difficulty with all this reasoning is that there was no statistical evidence of discrimination in this case, I submit. Whether we look at the cold figures or measure the statistics by the standard deviation test established by *Castaneda*, the statistical evidence does not jusitfy "any inference of discrimination;" the statistical evidence is at best neutral and, being neutral, it can give no "color" to the EEOC's charge. The only basis for a finding by the majority of discrimination in this case is the nonstatistical evidence and even the majority implicitly recognizes, I submit, that this nonstatistical evidence is insufficient in and of itself to sustain a finding of discrimination. There is accordingly no warrant for diagnosing the district court's finding on these nonstatistical matters as infected with legal error.

In summary, it is obvious that the statistical evidence was at best neutral and certainly was insufficient to support a prima facie finding of discrimination, when properly tested by the standard deviation test mandated by *Castaneda*, 430 U.S. at 496, n. 17. There was no piece of nonstatistical evidence which would support a finding of discrimination. Whether considered separately or together, the statistical and nonstatistical evidence did not make out a case of discrimination and the district court properly dismissed the action. The most relevant evidence was that offered in connection with the specific hiring decisions, to which I have already referred, and the evidence of the defendant's affirmative action program, as approved by the Department of Labor, evidence which the majority does not weigh, but evidence which *United Bank* says should be weighed in resolving whether EEOC has proved its case. 615 F.2d at 156. In the face of this evidence, I believe there is no basis in fact for a finding of liability in this case. When an employer has taken every hiring decision he has made and shows, as the bank did here, that no hiring decision was

tainted, and when he has proved an affirmative action program approved by the Government, he has effectively, I submit, rebuffed any claim of discrimination.

There remains an ancillary point that deserves perhaps some comment, though I do not regard it as relevant under my analysis of the case. The majority opinion dismisses the finding of the district court on the individual claims and declares that such rulings had "no preclusive effect" on the right of these claimants to relitigate their individual claims on remand. It reaches this conclusion because, as it says, the evidence in connection with these claims "was not offered at this stage to establish entitlement to individual relief, but merely as corroborating or buttressing evidence of a general pattern of racial discrimination in hiring." I submit this is contrary to the agreed triable issues and to the Commission's own statement of its claim, as quoted by me *supra*. One of those issues was "[w]hether any of the individual claimants whom EEOC presents at trial were denied employment. . .because of their race." It stated the procedure for proving such claims under *McDonnell Douglas* and declared it intended to follow that procedure in its proof. How can it be said, in the light of this clear declaration by the Commission of the purpose of its proof, that, proof of the individual claims was "not offered. . .to establish entitlement to individual relief," especially since the Commission proceeded to prove exactly what it claimed the backpay award in each individual case should be? The EEOC sought to prove all these claims, and, in addition it, through its paralegal Ms. Stephens offered evidence of the amount of backpay due each of such claimants and the manner in which backpay was calculated. It would appear that these individual claims were directly in issue and were to be determined at this stage in the proceedings. This, however, is, as I have said, unimportant if my views on the dispostion of the main issue are correct.

Finally, I would add that this case and *United Bank* are in effect twins. Both involved bank branches located in the very same areas. The charges in both cases were roughly the same. The

evidence submitted followed the same pattern. The district court reached a like conclusion in both cases. On appeal we sustained the dismissal in the earlier case (*United Bank*) but reverse it in this case. Such inconsistency in decision is unfortunate and properly raises doubts in the public mind about evenhandedness. I am unable to see how we can decide one case in favor of the defendant and not do likewise here. The rights of parties when they are the same, as I submit they are in the two cases, should not vary with different panels of the same court. I fear that is the situation here.

I would affirm the dismissal of this action for the reasons stated above.

APPENDIX B

Opinion of the United States District Court for the Eastern District of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Equal Employment Opportunity Commission, Plaintiff,	)	
v.	)	Civil Action
	)	No. 76-26-N
American National Bank, Defendant.	)	

ORDER

In accordance with the Memorandum Opinion filed simultaneously herewith, it is ORDERED that the plaintiff's claims against the defendant be, and they hereby are, DISMISSED.

The Court enters judgment in favor of the defendant against the plaintiff for counsel fees and costs and requires defendant to file with the Court within ten (10) days of the entry of this Order an itemized statement of its fees and costs together with any memoranda and materials in support thereof. Thereafter the plaintiff will be given ten days to respond.

s/ J. Calvitt Clarke
United States District Judge

June 25, 1979
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Equal Employment Opportunity Commission,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 76-26-N
American National Bank,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff, the Equal Employment Opportunity Commission [hereinafter referred to as "EEOC" or "the Commission"], brought this action pursuant to Title VII of the 1964 Civil Rights Act as amended (42 U. S. C. § 2000e *et seq.*). EEOC contends that defendant American National Bank engaged in a pattern or practice of racially discriminatory hiring practices between 1969 and 1975. The Commission seeks relief in the form of an injunction against further discrimination, a requirement that defendant institute an affirmative action program, back pay for victims of discrimination, an award of costs to the Commission, and other relief that the Court may deem appropriate. After a four-day trial, consideration of the record and briefs of counsel, this case is now ready for final disposition. This Opinion constitutes the Court's findings of fact and conclusions of law.

The parties have agreed that the triable issues in this action are the following:

A. Whether the Court has jurisdiction to award relief and what relief, if any, is appropriate.
B. Whether defendant American National Bank failed or refused to initially hire black employees because of race from 1969 to 1975.
C. Whether any of the individual claimants whom EEOC presents at trial were denied employment by American National Bank because of their race.
D. Whether the passage of time has prejudiced defendant.

I. *The Jurisdictional Issue*

Certain jurisdictional prerequisites are not in controversy here. The parties agree that from 1969 to 1975 defendant American National Bank, a nationally chartered bank doing business in Virginia, was an employer engaged in an industry affecting commerce and had more than twenty-five employees. See 42 U. S. C. § 2000e(b), (g), and (h). They also stipulate that the EEOC filed this action after receiving a charge alleging an unlawful employment practice by defendant. See *id.* § 2000e-5(b), (f) (l).

Nevertheless, defendant argues that this Court lacks jurisdiction here. Basically, the argument runs as follows. Because the EEOC cannot establish and has not established that the charging party, Sandra Holland, ever filed an application for employment with the Suffolk branch of the bank, the Court must find that Ms. Holland never applied in Suffolk. Therefore, Ms. Holland failed to meet two jurisdictional requirements: she could not qualify as a "person claiming to be aggrieved" so as to have standing to file a charge, nor could she have filed a charge within ninety days[1] after an alleged unlawful employment practice. See *id.* § 2000e-5(b), (e); *United Air Lines* v. *Evans*, 431 U. S. 553, 555 & n.4 (1977).

The EEOC strenuously disagrees with defendant's argument. According to the Commission, the deposition and trial testimony of Sandra Holland establish that she did apply for employment in 1969 at the Suffolk branch of the American National Bank. Furthermore, even if she did not, the filing of her charge with the Commission empowered the EEOC to uncover more general instances of discrimination during an investigation of the charge. See *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976).

Resolution of the jurisdictional issue here requires a review of the relevant facts and legal principles. Thus, the Court will first examine the factual background of this case.

CASE HISTORY

Sandra Holland filed a charge of discrimination with the EEOC on June 19, 1969 (Stip. Ex. #1).[2] The charge alleged that in May 1969 she had been discriminated against because of race or color when she applied for a position at a branch of defendant bank in Suffolk. Holland further stated that, to the best of her knowledge, the Suffolk branch had hired blacks only for janitorial positions.

In a letter to the Suffolk branch dated June 23, 1969, the Commission notified defendant of the filing of the charge (Stip. Ex. #2). Three and one-half months later, Ms. Holland unsuccessfully applied for a position at one of defendant's branches in Portsmouth (Stip. Ex. #131).[3] On March 4, 1970, the EEOC

[1] At the time Ms. Holland filed her charge with the EEOC, Title VII required filing of charges within ninety days after the alleged unlawful employment practice occurred. In 1972, however, Congress enlarged the limitations period to 180 days. *United Air Lines* v. *Evans*, 431 U. S. 553, 555 n.3 (1977).

[2] Throughout this Opinion the abbreviation "Stip. Ex." refers to Stipulation Exhibits, followed by the appropriate exhibit numbers. "Stip. Par." refers to a numbered paragraph contained in the Stipulation of Facts of the November 22, 1978, Order on Final Pretrial Conference. Contested exhibits will be cited either as plaintiff's ("Pl. Ex.") or defendant's ("Def. Ex.") along with the proper exhibit number. "Tr.," of course, refers to the trial transcript.

[3] At least since 1969, defendant has operated branch offices in the Cities of Portsmouth and Suffolk. (Stip. Par. #2).

informed Donald King (Assistant Vice President of defendant for Suffolk personnel) that an investigator would visit "your area" in the near future (Stip. Ex. #3). Ms. Ruth Crow of the EEOC conducted an on-site investigation and issued defendant a copy of the charge on March 31, 1970 (Stip. Ex. #9, 10).

The Washington Area Office of the Commission issued its "Area Director's Findings of Fact" (Stip. Ex. #10) on December 30, 1970 - eighteen months after Sandra Holland filed her charge. The "Findings of Fact" stated that "respondent" - which the Director listed as "American National Bank, Suffolk, Virginia" - had been unable to locate any application by Ms. Holland in Suffolk in May 1969 (although her later application in Portsmouth was located). By memorandum dated July 3, 1972, the Washington Area Office forwarded the Holland case to the Decisions Divison of the EEOC for a determination (Stip. Ex. #12).

The Commission issued its formal "Determination" (Stip. Ex. #16) on March 11, 1974 - almost fifty-seven months after Holland filed her charge. It found that there was reasonable cause to believe that "respondent" - which it cited as "American National Bank, Suffolk, Virginia" - had engaged in unlawful employment practices. Although the 1970 investigation had found that "respondent" possessed all applications filed with it from February through June 1969 and had no application from Holland, the EEOC nontheless credited Holland's statement that she did apply on the basis of the following additional evidence:

> Respondent's Personnel Director of the Suffolk Office during the time Charging Party [Holland] allegedly sought employment with Respondent states in an affidavit that upon reviewing the October 10, 1969, application he did recall that two Negro females came into his Suffolk Office sometime in 1969 to apply for a position. He further states that he did not remember their names, but he does remember that one of the females stated that she had worked

> at B. D. Laderberg's at one time. (Charging Party was employed at B. D. Laderberg's). . . He asserts that he gave the female an application and told her that she could fill it out at the office or take it home and mail it back.

(*Id.*, p. 2). The Commission noted that apparently, before November 1969 "respondent" had hired blacks only for service worker positons; for example, "respondent's" employment statistics for May 1969 showed that no blacks were employed in the 18 office and clerical positions. Then the Commission made the following statement:

> In its exceptions Respondent supplied information concerning Negroes hired into teller and bookkeeper positions in its Portsmouth branch. This information is irrelevant to employment at its Suffolk branch.

(*Id.*, p. 3 n. 1) (emphasis added).

EEOC and defendant conducted conciliation discussions between July 10 and August 22, 1974. The discussions proved unsuccessful, and EEOC immediately notified Sandra Holland of the failure and of her right to sue. (Stip. Ex. #19-21) Ms. Holland declined to file suit, and EEOC instituted the present action on January 21, 1976. The allegations of the complaint were not confined to the activities of defendant's Suffolk branches; rather, EEOC now charges that both the Suffolk and the Portsmouth branches have engaged in a pattern or practice of racial discrimination since 1969.

The Court is aware that Sandra Holland, whose sole complaint was the trigger for the EEOC's action in this case, had applied to many other banks in this area during the same time period. See *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403 (4th Cir. 1977), and *EEOC* v. *United Virginia Bank/Seaboard National*, Record No. 75-166-N, U. S. District Court, E.D. Va. (Oct. 7, 1977), where it was shown that Ms. Holland had applied

for employment at both the Norfolk and Suffolk branches of United Virginia Bank/Seaboard National in 1969 and had actually been interviewed in the Suffolk branches of that bank. Portsmouth, where the complainant filed her American National application, and Norfolk are part of the same metropolitan area, being separated by the Elizabeth River. Ms. Holland testified in a discovery deposition taken in this case that she had applied to many banks (Dep. pp. 5, 10, 12, 15, 22, 52, 54); that she was "mixed up" on the dates of her application filings (Dep. p. 10); that she cannot remember whether she filled out the application at the bank and filed it at the time or whether she took the application home and filled it out and later mailed it in (Dep. pp. 11, 12); that she doesn't know who she talked to at the bank (Dep. p. 12); that she moved from Suffolk to Portsmouth, Virginia, in May or June 1969 (Dep. p. 32); and, most importantly, she did not remember if she filed an application with the Suffolk branch of American National Bank in May 1969 (Dep. pp. 12, 13, 14, 15).

The defendant has no record of receiving an application at Suffolk from Ms. Holland although an official of the Suffolk branch remembers handing a blank employment application form to someone who might have been Ms. Holland. That blank application was to be left at or mailed to the Suffolk branch. In the light of the foregoing, the Court finds as a fact that Ms. Holland did not file an application for employment at the Suffolk branch of the American National Bank.

With these facts in mind, the Court now addresses three issues:

(1) Whether there was a "valid charge";
(2) Whether, if Holland's charge was valid, the EEOC was empowered to investigate broader and more general instances of discrimination by defendant and to include such instances in this suit;
(3) And, in a related vein, whether the Court has jurisdiction over all the allegations of discrimination at issue in this suit.

A. *The Validity of the Charge*

The filing of a charge of discrimination with the EEOC " by or on behalf of a person claiming to be aggrieved" is a condition precedent to the bringing of a civil action under Title VII. *E.g.*, *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970). Indeed, before commencing a civil action, the EEOC must do the following: serve a notice of the charge on the employer; investigate the charge; determine whether there is reasonable cause to believe that the charge is true; and, if there is reasonable cause, endeavor to eliminate any alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. 42 U.S.C. § 2000e-5(b), (f)(1); *EEOC* v. *Raymond Metal Products Co.*, 530 F.2d 590, 592 (4th Cir. 1976).

The purpose of filing a charge under Title VII is simply to "trigger" the investigatory and conciliatory procedures of the EEOC. Consequently, the EEOC is without jurisdiction to proceed in any case in the absence of a valid charge. If the charge is invalid, the Court lacks jurisdiction over any civil action filed pursuant to the charge. *EEOC* v. *General Electric Co.*, 532 F.2d 359, 364 (4th Cir. 1976); *Graniteville Company (Sibley Division)* v. *EEOC*, 438 F.2d 32, 35, 38 (4th Cir. 1971).

The Court finds that the applicable standard for determining the validity of a charge was enunciated by the United States Court of Appeals for the Fourth Circuit in *Graniteville Company (Sibley Division)* v. *EEOC*, *supra*. Under the heading, "Standards for a Valid Charge," the Court of Appeals stated, in pertinent part:

> We do not deny the propostion... that the EEOC is without jurisdiction to proceed in the absence of a valid charge. [citation omitted] However, the statute quite clearly requires only that a charge be filed "by a person claiming to be aggrieved" by an employer, employment agency, or labor organization engaged in an unlawful employment practice, 42 U.S.C. 2000e-5 (emphasis added). When an individual fills out an EEOC form entitled "Charge of Discrimination," checks a box indicating discrimination because of "Race or

> Color," names a respondent in answer to the question "Who discriminated against you?", indicates "The most recent date on which the discrimination took place," and alleges the existence of racially discriminatory employment practices in response to the instruction "Explain what unfair thing was done to you," we think it plain enough that he is claiming to be aggrieved within the statutory meaning of Title VII.

Id. at 36. The charge, of course, must contain allegations which, if proven, would constitute violations of Title VII. Furthermore, the allegations must be sufficiently specific to inform the EEOC of what it is to investigate and notify the respondent of the alleged practices it will be called upon to defend. *Id.* at 37-38.[4] However, because the charges are usually filed by lay-complainants without the assistance of counsel, the allegations are to be liberally construed. See *id; cf. EEOC* v. *General Electric Co.*, 532 F.2d 359, 364 (4th Cir. 1976) ("The charge is not to be treated as a common-law pleading that strictly cabins the investigation that results therefrom...").[5]

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[4] In addition, a charge is valid only if it is in writing and under oath or affirmation. 42 U. S. C. § 2000e-5(b); *EEOC* v. *Appalachian Power Co., Inc.*, 568 F.2d 354 (4th Cir. 1978). This requirement is not in issue here, however. See Stip. Ex. #1 (charge signed and sworn by Holland before an Equal Employment Officer).

[5] The majority of courts are extremely liberal in determining whether an individual is a "person claiming to be aggrieved" and has standing to file a charge under Title VII. See, *e.g.*, *EEOC* v. *Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U. S. 915 (1978); *Waters* v. *Heublein, Inc.*, 547 F. 2d 466 (9th Cir. 1976), *cert. denied*, 433 U. S. 915 (1977); *National Organization of Women* v. Sperry Rand Corp., 457 F. Supp. 1338 (D. Conn. 1978), all of which held that white individuals are "claiming to be aggrieved" when they file charges alleging discrimination against blacks. But see *e.g.*, *EEOC* v. *Quick Shop Markets, Inc.*, 396 F. Supp. 133 (E. D. Mo.), *aff'd*, 526 F.2d 802 (8th Cir. 1975). *Cf. Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U. S. 205 (1972) ("person aggrieved" under 1968 Civil Rights Act includes whites complaining of discrimination against blacks in apartment rentals).

Under the *Graniteville* standard, the charge filed by Sandra Holland on June 19, 1969, was plainly valid. Ms. Holland completed the EEOC's "Charge of Discrimination" form; checked the box indicating discrimination because of "race or color"; named "American National Bank, Suffolk, Virginia," in answer to the question "Who discriminated against you?"; indicated "May 1969" as the most recent date on which the discrimination occurred; and alleged the existence of racially discriminatory practices in response to the question "Explain what unfair thing was done to you"[6] (Stip. Ex. #1). Thus, the charge furnished the necessary "jurisdictional springboard" for the EEOC to conduct an investigation. *EEOC* v. *General Electric*, *supra*, at 364.

Admittedly, *Graniteville* defined "validity" only in terms of the EEOC's power to conduct an investigation after the filing of the charge and was not concerned with "validity" in terms of the final reasonable cause determination or the jurisdiction of this Court. That is of no consequence here, however. In its determination, the EEOC found reasonable cause to believe that Ms. Holland had submitted an application in Suffolk in May 1969 (and therefore had filed a timely charge); that she had been a victim of racial discrimination; and that the Suffolk office discriminated against blacks as a class. The evidence on which the Commission based its findings was hardly overwhelming, but Congress did not intend that in Title VII suits federal district courts should act as appellate bodies and review Commission determinations of reasonable cause to see if they are supported by substantial evidence. *E.g.*, *EEOC* v. *General Electric*, *supra*, at 370 & n.31; *EEOC* v. *Allegheny Airlines*,

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[6] Ms. Holland stated:

"I have applied for a position with the above named Bank and was told that my application whould [sic] be kept on file. I am qualified to fill a Clerk and/or a Tellers position. White applicants have been hired and I feel that the reason that I have not been hired is because of my race (Negro). To the best of my knowledge, the above named bank located in Suffolk, Virginia, has never hired a Negro except to fill a Janitors position."

436 F. Supp. 1300, 1305 (W.D. Pa. 1977); *EEOC* v. *E. I. duPont de Nemours and Co., Chestnut Run and Affiliated Facilities*, 373 F. Supp. 1321, 1338-39 (D. Del. 1974), *aff'd on other grounds*, 516 F.2d 1297 (3d Cir. 1975).

The reasonable cause determination is not binding on this Court, however. A court trial in a Title VII action is *de novo*, entirely separate from the actions of the EEOC. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973); *EEOC* v. *General Electric Co.*, *supra*, at 370 & n. 33. Thus, ordinarily if the Court determines after the filing of the suit that an individual charging discrimination in hiring filed no timely charge, the complaint should be dismissed for want of jurisdiction.* See, *e.g.*, *United Air Lines* v. *Evans*, 431 U.S. 553, 555 n.4 (1977); *McDonnell Douglas Corp.* v. *Green*, *supra*, at 798; *Cutliff* v. *Greyhound Lines, Inc.*, 558 F.2d 803, 805-06 (5th Cir. 1977); *Doski* v. *M. Goldseeker Co.*, 539 F.2d 1326, 1329 (4th Cir. 1976); *Rudolph* v. *Wagner Electric Corp.*, 445 F. Supp. 836, 838 (E.D. Mo.), *aff'd*, 586 F.2d 90 (8th Cir. 1978); *Cunegin* v. *Zayre Department Store*, 437 F. Supp. 100, 103-04 (E.D. Wisc. 1977); *Lamont* v. *Forman Brothers, Inc.*, 410 F. Supp. 912, 916 (D. D.C. 1976).

Had Ms. Holland brought this action, alleging only that she personally had been a victim of discrimination (and not alleging discrimination against all blacks), whether or not she actually applied would have been an important jurisdictional issue. See, *e.g.*, *Blanks* v. *Register*, 493 F.2d 697, 699-700 (4th Cir.), *cert. denied*, 419 U.S. 841 (1974); *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 969 (D. Md. 1977); *Wilson* v. *Kelley*, 294 F. Supp. 1005, 1010 (N.D. Ga.), *aff'd per curiam*, 393 U.S. 266 (1968). This is not such a case, however. Here the EEOC is alleging that

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*But see *Graniteville Company (Sibley Division)* v. *EEOC*, 438 F.2d 32, 37 (because Title VII suit is a "sort of class action for fellow employees similarly situated," plaintiff's acceptance of promotion subsequent to filing suit does not moot Title VII suit alleging discrimination in hiring; also, person may even be "aggrieved" by employment practices to which he is not immediately subject).

defendant engaged in a pattern or practice of discrimination not only against Holland but also against blacks as a class (including 51 named individuals who applied for a position).

As the Court will discuss *infra*, a portion of the broader allegations were properly includible in this action. *EEOC* v. *General Electric*, *supra*, held that where, as here, the EEOC brings suit alleging discrimination that was uncovered during a reasonable investigation of the original charge, whether the charging party had standing to file the charge is an irrelevancy. In that case, a black male filed with the EEOC a charge alleging racial discrimination in hiring through the use of certain employment tests. The Commission found that while he had not been a victim of discrimination, the tests were a form of sex discrimination. Although the charging party (a male) had no standing to challenge discrimination against women, the Court of Appeals held that the EEOC could file a civil suit alleging sex discrimination because the "new" allegation of discrimination grew reasonably out of the investigation of the initial charge. *Id.* at 362, 368. Traditional standing requirements do not apply to such EEOC-initiated suits:

> [U]nlike the individual charging party, the EEOC, when it sued, did so "to vindicate the public interest" as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party. Because of this significant difference, the EEOC's suit was "broader [in scope] than the interests of the charging parties." It follows that the standing of the EEOC to sue under Title VII cannot be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights. To hold otherwise, as did the District Court, would be to continue treating the sole purpose of the Title to be the correction of individual wrongs rather than of public or

> "societal" wrongs as well as to deny to the EEOC the right to be any more than a mere proxy for the charging party rather than what Congress by the Amendment of 1972 intended, *i.e.*, the public avenger by civil suit of any discrimination uncovered in a valid investigation and subjected to conciliation under the Act. We find no warrant whatsoever for placing such limitation on the right or standing of the EEOC to bring suit; indeed, were such limitation to be imposed, it would be in our opinion a clear nullification of the legislative intent in enacting the Amendments of 1972.

Id. at 373. Perhaps, as defendant contends, there is a substantial difference between *General Electric*, where the charging party actually applied for employment but the EEOC later found that he was rejected for nondiscriminatory reasons, and this case, where Ms. Holland did not even file an application for employment before filing a charge. Surely Congress must have expected that, absent extraordinary circumstances, an individual would make a formal request for employment before filing a charge with the Commission against the employer. As the Court has already stated, however, the sweeping language of *General Electric* makes the standing of the original charging party an unimportant issue in this pattern-or-practice case. Experience may show that abolition of the standing requirement was unwise and ill-considered. But reconsideration of *General Electric* is the function of the Court of Appeals, not of this Court.

In view of *General Electric*, the Court finds that whether Ms. Holland filed an application for employment has no effect on the jurisdiction of this Court. The charge filed by Holland met the requirements of *Graniteville* and was, therefore, a "valid charge" empowering the EEOC to conduct an investigation. Because the present action by the EEOC alleges that defendant has practiced discrimination that extends far beyond Holland's individual case, whether Holland did or did not file an application in Suffolk is irrelevant under applicable case law binding on this Court.

Rather, the question is whether the EEOC could include the broader allegations of discrimination.

B. *The Investigation and Allegations of "Broader" Discrimination Than That Described in the Charge*

Liberally construed, the charge by Ms. Holland alleges that defendant's Suffolk office refused to hire her because of her race and maintains a general, classwide policy of discrimination against blacks.[*] (See Stip. Ex. #1). After conducting an investigation, the EEOC concluded that the Suffolk branch had discriminated against blacks as a class because of their race. (*Id.* #2).[*] The question is whether the EEOC could broaden its investigation beyond the narrow issue of whether Holland had been a victim of racial discrimination and, if so, whether the broader allegations of discrimination could be the subject of the present action.

The Court finds that this issue must be answered in the affirmative. Holland's charge is sufficient to support an investigation by the EEOC as well as a civil suit for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge. *EEOC* v. *Chesapeake & Ohio Ry.*, 577 F.2d 229, 231-32 (4th Cir. 1978); *EEOC* v. *General Electric Co.*, *supra*, at 366.

Here the charge alleged discrimination against Holland personally and a general policy of racial discrimination in Suffolk. The Court finds that the activities of the Suffolk branch were the subject of a reasonable investigation of the Holland charge. Certainly, an investigation of the general policies and practices of the Suffolk branch was relevant to the allegation of discrimination against Holland personally. Indeed, the EEOC would have been

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[*] The reasonable cause determination cited the paucity of blacks on the work force and several pre-employment procedures (Wonderlic test, credit rating checks, and character reference checks) that operate to exclude a disproportionate number of blacks. (Stip. Ex. #16, pp. 2-5).

unfair to the bank and remiss in its statutory responsibility of "vindicating the public interest" if it had conducted an overly narrow investigation. Thus, the EEOC could make the general hiring practices of defendant in Suffolk the subject of this litigation. *EEOC* v. *American National Bank*, 574 F.2d 1173, 1175 (4th Cir.), *cert. denied*, 99 S. Ct. 213 (1978).

C. *The Scope of This Action*

Although *General Electric* empowered the EEOC to bring civil actions alleging matters not stated in the original charge but arising out of a reasonable investigation of the charge, that power is not unlimited.

> [T]he original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act.

Id. at 366 (emphasis added; original emphasis and footnotes omitted). The Court of Appeals most recently reaffirmed this requirement in *EEOC* v. *Chesapeake & Ohio Ry.*, 577 F.2d 229, 231-32 (4th Cir. 1978):

> [T]he suit can be based on evidence of other discrimination developed in the course of a reasonable investigation of an initial charge, provided that these illegal practices are "included in the reasonable cause determination of the EEOC and...[are] followed by compliance with the conciliation procedures fixed in the Act." 532 F.2d at 366.

The question is whether all the matters alleged in this suit were included in the reasonable cause determination made by the EEOC in March 1974.[9]

The requirement that "new" discrimination be included in the reasonable cause determination achieves several purposes. First, it minimizes the possibility that the employer against whom the charge has been brought will be surprised or prejudiced if he ultimately becomes the defendant in a civil suit alleging "new" discrimination not described in the original charge. To make the "new" discrimination the subject of the reasonable cause determination, the Commission will procure adequate supporting evidence, most of which is in the hands of the employer. Therefore, when the Commission asks him for the material, he will be put on notice that the investigation is not being confined to the allegations of the initial charge. *See EEOC* v. *General Electric Co.*, *supra*, at 368-69. Second, inclusion of the "new" discrimination in the reasonable cause determination will inform the employer precisely which of his employment practices are questionable. Third, the reasonable cause determination will afford the opportunity for conciliation, voluntary compliance, and the avoidance of litigation. *EEOC* v. *Chesapeake & Ohio Ry.*, *supra*, at 232.

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[1] In the course of ruling that this case should not have been dismissed under the doctrine of laches, the Court of Appeals stated: "The commission was entitled to bring suit on these broader allegations because they were founded on the reasonable cause determination and conciliation efforts." *EEOC* v. *American National Bank*, 574 F.2d 1173, 1175 (4th Cir.), *cert. denied*, 99 S. Ct. 213 (1978). While at first glance this statement may be construed as holding that the EEOC may include in this suit the practices of all of defendant's branches -- whether included in the reasonable cause determination or not -- the Court is persuaded, after reading the statement in the context of the appellate opinion, that such an interpretation would be erroneous. The proper scope of this action had not been at issue when this Court dismissed the complaint. 420 F. Supp. 181 (E. D. Va. 1976). Rather, the Court of Appeals made its statement only in the course of discussing the applicability of laches in a Title VII suit. Although laches would be a relevant issue in determining the scope of relief, it could not bar the EEOC from litigating those matters which could be included in this action under *General Electric*. See 574 F.2d at 1175-76. Therefore, the Court does not find that the issue has been settled.

In this action the EEOC complains that between 1969 and 1975 defendant practiced racial discrimination in hiring in its Portsmouth and Suffolk branches.[10] The Suffolk branches were discussed in Holland's charge and the reasonable cause determination. (Stip. Ex. #1, 16). The Portsmouth branches, however, are another matter.

The record establishes that between the filing of Holland's charge and issuance of the reasonable cause determination, the EEOC did not associate the Portsmouth branches with the suspected discriminatory activities of Suffolk. Ms. Holland listed "American National Bank, Suffolk" as the party who had discriminated against her. (Stip. Ex. #1). In a March 25, 1970, letter addressed to defendant's vice president at its main Portsmouth branch, Ms. Ruth Crow of the EEOC stated that she soon would be "in Suffolk" and requested him to "contact your Suffolk branch to inform them to expect a call from me shortly after my arrival." (Stip. Ex. #6). While the Area Director's Findings of Fact noted that defendant operated branches in Portsmouth and Suffolk, it named as respondent "American National Bank, Suffolk, Virginia." (Stip. Ex. #10).

The reasonable cause determination of the EEOC focused solely on the activities of the Suffolk branches. Again the Commission listed "Suffolk, Virginia" as the address of the "respondent." (Stip. Ex. #16). The determination noted that in May 1969 "respondent" employed 18 whites and no blacks in office and clerical positions. These figures are identical to those listed on the EEO-1 report submitted by the Suffolk branches in May 1969 to the EEOC. (See Stip. Ex. #54-87).[11] The Commission compared

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[10] It appears that during this period defendant maintained seven branches in Portsmouth and two branches in Suffolk. (Tr. 25-26, 889-90). Defendant also has one branch in Norfolk and one branch in Chesapeake; these two branches were not established until sometime after mid-1973. (Tr. 889-90; Stip. Ex. #54-87).

[11] In contrast, the EEO-1 report submitted by the Portsmouth branches in May 1969 reported 108 whites and no blacks in office and clerical postions. (See Stip. Ex. #54-87).

these figures only to the racial composition of Suffolk. (Stip. Ex. #16, p.3). Finally, and most significantly, the Commission rejected as "irrelevant to employment at its Suffolk branch" information which, according to defendant, showed that blacks had been hired into teller and bookkeeper positions. (*Id.*, p. 3, fn. 1).

In view of the above, the Court finds that the activities of defendant's Portsmouth branches were not the subject of the EEOC investigation, nor were they "included" in the reasonable cause determination within the meaning of *General Electric*. Therefore, the Court is without jurisdiction over that part of the case which concerns the allegedly discriminatory activities of the Portsmouth branches and those individuals who applied at the Portsmouth branches and allegedly were rejected because of their race. In other words, this Court has jurisdiction only to decide whether the activities of defendant's Suffolk branches violated Title VII and whether those who unsuccessfully applied at Suffolk were victims of racial discrimination.

It might be argued that making such a distinction between the Portsmouth and Suffolk branches of defendant is unrealistic. After all, all branches are under common ownership and control. And, as indicated *infra*, the hiring practices of the Portsmouth and Suffolk branches are quite similar. Dismissing that part of the suit concerning the Portsmouth branches will result in the waste of resources and delay in enforcement which *General Electric* sought to avoid. See 532 F.2d at 365. It also seems especially inappropriate in a suite alleging a pattern or practice of racial discrimination.

Yet the Court is convinced that allowing the EEOC to include matters relating to the Portsmouth branches would be totally inconsistent with the objectives which are furthered by requiring inclusion of "new" discrimination in the reasonable cause determination. After examining the record, the Court finds that the EEOC confined its investigation to the hiring practices of the Suffolk branches.[12] The reasonable cause determination did not

find that the Portsmouth branches had violated Title VII; rather, it regarded their activities as "irrelevant." There is no evidence that the activities of the Portsmouth branches were the subject of the subsequent conciliation discussion. (Stip. Ex. #18, 19).[14] Thus, at least until mid-1974, defendant was led to believe that only its Suffolk branches were suspected of Title VII violations. Seventeen months after the conciliation effort failed, the EEOC filed suit, alleging openly for the first time that the Portsmouth branches had violated Title VII.

For nearly five years the Commission treated the Portsmouth branches as entities separate and distinct from, and independent of, the Suffolk branches for the purpose of determining Title VII violations. This differentiation continued throughout the conciliation effort. To allow the EEOC to execute an about-face at this point would make the requirements of *General Electric* meaningless. Those requirements apply to all suits, including pattern-and-practice suits. See 532 F.2d at 366 and note 14 *infra*. If proper notice to the employer and an adequate opportunity for conciliation and voluntary compliance are to be achieved, the EEOC must abide by the requirement that any alleged discriminatory practices which it seeks to litigate be included in the reasonable cause determination. *General Electric* states that when the "new" discrimination is not so included, it may not be the subject of a civil suit based on the charge. This is true even when the "new" discrimination would "logically" be included in the civil action alleging those matters included in the charge, the investigation, and the reasonable cause determination.[15]

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[14] See Stip. Ex. #2, 3, 4, 6, and 9; note 11 *supra* and accompanying text.

[15] Admittedly, the correspondence concerning the conciliation effort is scarce, and the Court does not have a copy of the proposed conciliation agreement. But it seems inconceivable that the Commission would have sought changes in the hiring practices of the Portsmouth branches since the conciliation effort began only four months after the issuance of the reasonable cause determination which had expressly excluded these branches from its findings of discrimination.

The EEOC has broad powers to vindicate the public interest as expressed in the Congressional purpose of eliminating employment discrimination as a national evil. Those powers, however, are not unlimited. *EEOC* v. *Bailey Co., Inc.*, 563 F.2d 439, 451 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). Because the matters alleged in this suit relating to the Portsmouth branches were neither investigated by the EEOC after the Holland charge nor made the subject of the reasonable cause determination of discrimination here, the Court has no jurisdiction to hear them. Accordingly, that portion of this action relating to the activities of the Portsmouth branches of defendant and to those individuals found in the next section of this opinion[15] to have applied to the Portsmouth branches must be DISMISSED. The remainder of defendant's motion for summary judgment is DENIED, insofar as it concerns the activities of the Suffolk branches.

This action is quite likely to be appealed to the Court of Appeals for the Fourth Circuit. In order to make a remand unnecessary in the event that the Court of Appeals disagrees with the aforementioned disposition of the jurisdictional issue, this Court will not confine its analysis of the merits to the activities of the Suffolk branches. Rather, for the sake of completeness the Court will examine the activities of all branches of defendant.

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[15] See, *e.g.*, *Nance* v. *Union Carbide Corp., Consumer Products Division*, 540 F.2d 718, 727 & n.20 (4th Cir. 1976), *vacated on other grounds*, 431 U. S. 952 (1977) ("questionable" that issue of sex discrimination in promotions was properly before trial court when initial charge and investigation were concerned only with alleged sex discrimination in layoff); *Macon* v. *Bailar*, 451 F. Supp. 140 (E. D. Va. 1978) (court dismisses, for lack of subject matter jurisdiction, charges of racial discrimination in use of forms and white review boards in promotion system, where initial charge stated only that supervisor discriminated against charging party in promotions); *Hubbard* v. *Rubbermaid, Inc.*, 436 F. Supp. 1184 (D. Md. 1977) (where initial charge and EEOC investigation focused only on alleged sexual discrimination in wages, hours, and conditions of employment, court has no jurisdiction over allegation in suit concerning recruitment, job classification, hiring, assignments, promotions, maternity benefits, etc.).

II. *The Merits*

EEOC alleges that between 1969 and 1975 defendant engaged in a pattern or practice of discrimination against black applicants in hiring because of their race. As plaintiff, the EEOC bears the initial burden of making out a prima facie case of discrimination. Proof that defendant committed isolated or sporadic discriminatory acts is insufficient. The EEOC must make a prima facie case that racial discrimination was defendant's standard operating procedure - the regular rather than the unusual practice. The burden then shifts to the employer to defeat this prima facie showing by demonstrating that the EEOC's proof is either inaccurate or insignificant. *E.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 334-36 & 360 (1977).[16]

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[15] The dismissal, however, extends only to those of the 52 alleged victims who applied in Portsmouth. In 1969, the Suffolk branches alone decided whom to hire in Suffolk; by 1975, however, the Portsmouth and the Suffolk branches jointly decided how to fill vacancies in Suffolk. (Tr. 51-53). When the change in procedure and control occurred is unclear. Nevertheless, since the Suffolk branches exercised some control over hiring in Suffolk throughout the period in question, the Court will assume in the next section of this opinion that the hiring decisions for those who applied in Suffolk were made exclusively by the Suffolk branches.

[16] This case is, therefore, a claim of disparate treatment rather than one of disparate impact. Thus, proof of discriminatory motive is critical here, although it can be inferred in some situations from the mere fact of differences in treatment. See *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 335-36 & n.20 (1977). The complaint filed by the EEOC appeared to include a claim of disparate impact, presumably on the basis of the reasonable cause determination's findings as to the Wonderlic tests, credit rating checks, and character checks employed by defendant. (Stip. Ex. #16, pp. 3-5). However, the EEOC's proposed findings of fact and conclusions of law concede that this case is to be considered only as a pattern-or-practice case.

In support of its allegations, the EEOC has submitted the following evidence: (1) statistics purporting to show gross disparities between defendant's labor force and the labor pool of persons who possess the qualifications needed for the specific job category; (2) defendant's alleged use of subjective selection criteria, preference for the friends and relatives of employees, word-of-mouth recruitment, and all-white interviewer staff; and (3) fifty-two specific instances of black applicants who allegedly were not hired by defendant because of their race. (Plaintiff's Reply to Defendant's Proposed Findings of Fact and Conclusions of Law, p. 3). Such evidence is proper in a "pattern-or-practice" case. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 303 (1977).[17]

Before analyzing the EEOC's evidence, however, the Court will describe the hiring process of defendant which is the core of this controversy.

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[17] As indicated in the introduction to this opinion, the parties have stipulated that there are really two substantive issues in this case: (1) whether defendant regularly and purposefully discriminated against blacks in hiring; and (2) whether any of the individual black applicants specifically named in the Order on Final Pre-Trial Conference were denied employment by defendant because of their race. In a pattern-or-practice suit, the EEOC is not required to offer evidence at the initial, "liability" stage that each person for whom it will ultimately seek relief was a victim of a discriminatory policy. *International Brotherhood of Teamsters* v. *United States*, *supra*, at 360. However, if it desires, the EEOC may present evidence of specific instances of discrimination in the "liability" stage. Such evidence in itself can establish a prima facie case in a pattern-or-practice suit, or it can be used to support other evidence. See *Hazelwood School District* v. *United States*, *supra*, at 303; *Teamsters*, *supra*, at 338-39, 357-60. Here the EEOC seeks to use the specific instances to bolster its case. As will be indicated in the discussion of the specific applicants *infra*, however, the Court not only will examine the applicants as part of the EEOC's overall "liability" evidence, but also will determine whether each specific applicant was a victim of discrimination.

THE HIRING PROCESS

Between 1969 and 1975, both the Portsmouth and Suffolk ocations of defendant hired persons to fill specific vacancies by creening applications on file when a vacancy was to be filled. Stip. Par. #20). No entry-level positions, as such, existed; ıpplicants were hired directly into vacancies that existed. (Stip. Par. #21).

While the Suffolk branches exclusively made hiring decisions as to those personnel applying in Suffolk during part, if not all, of the period in question,[18] the procedures utilized in Portsmouth and Suffolk in applications, screening, and initial hiring were quite similar. (Stip. Par.#20, 22, 24; Tr. 50-52, 62-63). Applicants for employment with any of the Portsmouth branches could receive and file job applications at defendant's main office in Portsmouth, located at High and Crawford Streets. (Stip. Par.#22; Tr. 33). Applications filed at Portsmouth branch offices were forwarded to the main office in Portsmouth for consideration (Stip. Par.#22). Those seeking positions in Suffolk could receive and file applications at defendant's Main Street office branch in Suffolk. (*Id.*) Both the Portsmouth and Suffolk branches allowed filing of applications even when a vacancy did not presently exist. (Tr. 36-37, 286). Applications were retained on file and could be considered for up to six months. (Stip. Par. #22; Tr. 33, 220, 286). With the possible exception of transferees (discussed *infra*), persons who failed to complete or file an application form were not considered for employment.(Tr. 348-49).

The application forms utilized by defendant in Portsmouth and Suffolk sought information regarding the applicant's personal life, personal background, education, work experience, and job preferences. *Inter alia*, defendant requested applicants to describe:

(1) whether they had been discharged or asked to resign from any position;

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[18] See note 15 *supra*.

(2) whether any of their friends or relatives worked for defendant;
(3) what business machines they operated and what special skills they had;
(4) what educational level they had attained;
(5) what jobs they had held in the past;
(6) what persons may be contacted as personal references;
(7) what position they desired; and
(8) what salary they expected.

(See, *e.g.*, Stip. Ex. #89).[19]

Once an applicant had completed the application form, he submitted it to a designated bank official or employee. (Tr 285, 357, 960).[20] The designee was required by defendant to review the application for completeness in the presence of the applicant. If the application was incomplete, the designee usually would obtain the missing information from the applicant and write it on the application (Tr. 262-63, 357, 894-95, 989, 1019). The designee also was to ascertain whether the applicant desired full-time or part-time work, and to note that preference on the application. (Tr. 982, 989). Although the applicant was told in most situations what types of positions were open, the designee was not permitted to state the salaries of the various positions. (Tr. 200, 285, 1019-21). Usually those officials responsible for screening applications and conducting interviews were not present when the applicant completed the form or talked with the designee. (Tr. 355, 960, 979-80).

During the period in question here (1969 to 1975), the race of an applicant was not noted on the application form. (Tr. 161, 980). The address and educational history listed on an application

[19] Occasionally, during the late 1960's and early 1970's, applicants completed a different application form. See, *e.g.*, Stip. Ex. #131, 133, 137, 149, 153 & 229. The information requested by the two forms was virtually identical, however. See, *e.g.*, Stip. Ex. #89, 133.

[20] Those seeking management positions, however, would submit applications directly to an executive of defendant. (Tr. 36).

might furnish clues in determining an individual's race, but were not very reliable indicators. (Tr. 846-47, 1025-28).[21]

Sometimes, if a vacancy existed at the time an individual filed an application, a bank official would conduct an interview with the applicant at that time. (Tr. 63-64, 356-58, 960). In most instances, however, officials in Suffolk and Portsmouth simply filed the application without interviewing the applicant. (Tr. 287). Later, when a vacancy existed, the officials would "screen" applications on file in order to select several persons for personal interviews. (Stip. Par. #24; Tr. 287-88).

As stated *supra*, both the Portsmouth and Suffolk branches maintained applications in an "active file" (thus making them eligible for consideration) for six months. However, when screening applications, bank officials first examined the most recent ones on file and then "went backward." Thus, five-to-six month-old applications were the last to be examined - if they were examined at all. (Stip. Par. #22, 24).

The most recent applications received initial consideration for two reasons. First, the officials knew from experience that recent applicants were still likely to be seeking employment, while less recent applicants probably had obtained employment, and no longer had interest in a position with defendant. Second, because the number of applications was usually very large, officials found it unnecessary to go beyond the most recent applications to find a sufficient number of people whom they wished to interview. (Tr. 102-03, 220, 286, 336, 981). As a result, Suffolk officials rarely examined applications older than thirty days, and Portsmouth officials generally confined their review to applications filed less than one month before. (Tr. 216, 987).[22] Normally, Portsmouth officials reviewed no more than 15 applications, while Suffolk officials selected for interviews all those whose applications had

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[21] After 1975, for purposes of its affirmative action program and applicant flow data, defendant maintained racial information on applicants. (Tr. 966, 980-81, 1024-25)

been on file less than thirty days and had indicated interest in the particular position now vacant. (Tr. 216, 220).

The decision whether to invite an individual applicant for an interview often depended upon what applications were available in the active file. (Tr. 1004, 1018-19). Generally, however, in comparing recent applications with the vacancies to be filled, officials considered the following factors in determining which of the applicants should be invited for an interview:

(a) Education. (Stip. Par. #24; Tr. 288). Until May 1975 a high school diploma or its equivalent was routinely required for employment by defendant. (Stip. Par. #30; Tr. 72-73). Yet, while education was important, a college eudcation often decreased the applicant's appealability. Those with college degrees rarely were invited for interviews. (Tr. 73, 203, 842, 995). Applicants with some college background, but no degrees, might be invited, particularly if their applications indicated willingness to accept a low salary. (Tr. 234, 1004, 1009).

(b) Experience. (Stip. Par. #24; Tr. 58, 288). Work history was an extremely important factor considered in the screening process. (Tr. 58-60, 893, 993). Officials especially prized applications from individuals who already had experience in handling money and in dealing with customers. (Tr. 932). Previous banking experience made an applicant even more

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[22] The number of applications on file was not always constant or predictable, however. In limited cases, therefore, "old" applications were considered. (Tr. 173, 220). Thus, Stip. Ex. #42 states that, of the 35 Suffolk hirees whose application and hiring dates were listed, 20 were hired within 30 days of the date their applications were filed, 6 between 30 and 40 days after filing, and only 9 were hired more than 40 days after filing. Of the 27 persons hired by the Portsmouth branches in 1975, 23 were hired within 30 days after they applied. Only one individual was hired more than 35 days after applying. (Stip. Ex. #45). Five of the seven blacks hired in Suffolk between 1969 and 1975, and all three of the blacks hired in Portsmouth in 1975, were hired within thirty-one days of the filing of their applications. (Stip. Ex. #42, 45).

[23] Previous banking experience was not *sine qua non*, however. For example, those hired as tellers without previous teller experience were trained after hire. (Stip. Par. #27).

attractive, since hiring persons with such experience reduced defendant's training expenses. (Tr. 59, 939).[20] When a position required special skills (typing and shorthand, for example), officials tried to select applicants who possessed such skills. (Tr. 63). Applicants who had held many jobs within a short time period, or who had stayed only a short time in several positions, were considered unstable and rarely survived the screening process. (Tr. 843-44). Without an adequate explanation, those who had been fired or laid off from past jobs were unlikely to be invited for an interview. (Tr. 178, 836).

Work experience and education were the two most important factors in the screening process. (Tr. 60-61). For non-management positions, experience was considered a more important factor than education. (Tr. 58, 288, 948-49, 1012).

(c) Salary Expected. (Tr. 191-92, 836, 900, 983). Applicants usually filled in a space on the application form designated "salary expected." If the salary expected far exceeded the salary that defendant normally paid to those in the vacant position, the applicant would not be invited for an interview. (Tr. 837-39).

(d) Position Desired. (Tr. 983). Normally, an applicant was considered for a particular position only if he had named it in the "position desired" space on the application form. If the "position desired" space was not completed, the applicant usually was considered for no job. (Tr. 202, 893). However, in some instances, applicants have been hired for postions other than those specifically named as "desired" on their applications. (Stip. Par. #25).

(e) Address of the Applicant. Officials of defendant attempted to select applicants who lived in the general area of the branch or branches where they wished to work. (Tr. 289, 998).

(f) Listing of Friends or Relatives Working at American National Bank. An applicant's chances of surviving the screening process might be enhanced if he listed friends or relatives working for defendant. (Tr. 225-26, 839-40, 922, 983).[21]

(g) Neatness and Correctness of the Application. When a vacant position required accuracy, neatness in writing, and correct spelling, the neatness and spelling of information written on the application could work to an applicant's advantage or disadvantage. (Tr. 905).

(h) Past Bonding or Inability to be Bonded. Defendant required, as a matter of policy, that every employee -- regardless of position -- be bondable. Consequently, an applicant whom a surety company had refused to bond in the past was unlikely to be considered for an interview. (Tr. 835-36).

(i) Willingness to Work Full-time or Part-time. As stated *supra*, the bank employee designated to receive applications was supposed to ask the applicant, and to record, whether the individual wished to work full-time or part-time. Those desiring full-time work tended to be excluded from consideration for part-time positions. (Tr. 142, 155, 247, 999).[25]

In a few cases, if the reviewing official determined that no applicant possessed the qualifications for a particular position, no applicant would be interviewed and the bank would advertise the vacancy. (Tr. 57). Usually, however, once the screening process had been completed, bank officials would attempt to contact by telephone those applicants whom they wished to interview. If the applicants could not be reached by telephone, officials would send letters to them. (Tr. 61, 222).

At the interview, the applicant would be requested to explain or describe in greater detail certain information that he had written on the application form. (Tr. 847-48). Interviewers evaluated the applicant's ability to communicate, maturity, personality, and physical appearance, which were considered important factors in filling "contact" positions (*i.e.*, positions that

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[24] The character references listed by an applicant might influence a reviewing official who knew any of them, but the importance of character references at the screening stage was minor. (Tr. 845).

[25] Finding individuals willing to work only part-time often proved a difficult task for bank officials. (Tr. 930).

involved frequent contact with bank customers). (Tr. 59-60, 66, 226, 848-49, 906-11, 922-26). For example, the Suffolk branches maintained a policy of hiring young, attractive females as tellers. (Tr. 226).

In determining whether to hire a given applicant, the interviewer took into account his evaluation of the applicant during the interview and the various factors considered during the screening process. (Tr. 847-48). The interviewer's decision to reject an applicant was generally controlling.[26] Sometimes an applicant was interviewed by his or her prospective supervisor prior to an offer to hire. (Stip. Par.#26).

The criteria and standards used as part of the decision-making process in hiring were not written. (Stip. Par. #26; Tr. 288). Assessments, therefore, could vary from interviewer to interviewer. (Tr. 907). There were no written job descriptions. (Stip. Par. #28; Tr. 283, 344, 354). All of the officials involved in the decision-making process were white. (Stip. Par. #24). None of them had received formal training in screening, interviewing, or hiring, and only a few had previous experience in hiring. (Tr. 281, 343, 351, 950, 1008).

When defendant was particularly interested in hiring an applicant, prior employers were contacted to verify the information listed on the application and to obtain an evaluation of the applicant as a worker. (Tr. 914-15). Character references were sometimes, but not always, checked. (Tr. 845, 914-15). Prior to September 1975, defendant occasionally made retail credit checks on persons it had determined to employ. (Stip. Par.#31).[27]

[26] In Suffolk, for example, an interviewee usually was interviewed twice -- first by the assistant manager, then by the manager -- before being hired. However, if the assistant manager was unimpressed during the first interview, the manager rarely bothered to hold a second. (Tr. 951, 962).

[27] Until June 1973, defendant administered to applicants the Wonderlic Personnel Test, the Number Series, and the Name Finding and Number Perception Test. A shorthand and typing test were administered from 1969 to 1975 (and are still being administered) to those seeking secretarial positions. (Stip. Par #30).

STATISTICAL EVIDENCE

Statistics can play an important role in pattern-or-practice cases. In some cases, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Hazelwood School District* v. *United States*, 433 U. S. 299, 307 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977). However, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, *supra*, at 340.[28]

The EEOC's statistical approach here purports to compare blacks in the available pools for Portsmouth and Suffolk with the number of blacks employed by defendants between 1969 and 1975. Defendant, in rebuttal, has presented what purports to be applicant flow data and the standard deviation analysis described in *Castaneda* v. *Partida*, 430 U. S. 482 (1977) and *Hazelwood School District* v. *United States*, *supra*. The Court will analyze each of these in turn.

A. *Comparative Data*

According to the EEOC, a comparison of the percentages of blacks employed in various job categories at the Suffolk and Portsmouth facilities with the availability of blacks in the respective work forces shows that blacks have been and continue to be underrepresented in defendant's work force. The Court agrees that gross statistical disparities between the racial composition of the work force of defendant and that of the qualified population in the relevant labor market is evidence of a pattern or practice of discrimination. In fact, such disparities alone may establish the existence of a pattern or practice. See, *e.g.*, *Hazelwood School District* v. *United States*, *supra*, at 307-09; *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975); *United States* v.

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[28] See, *e.g.*, *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135, 1142 (4th Cir. 1978), *cert. denied*, 47 U. S. L. W. 3465 (1979); *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975).

Chesapeake & Ohio Ry., 417 F.2d 582, 586 & n.7 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1380-82 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

As the United States Supreme Court stated in *Teamsters, supra*,

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the populations in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

431 U.S. at 340 n.20. Of course, as indicated *supra*, statistics are not necessarily conclusive proof of purposeful discrimination. *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d. 1135, 1142 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3465 (1979); *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403, 406 n.6 (4th Cir. 1977).

When a plaintiff in a Title VII case seeks to utilize comparative work-force statistics, the Court must determine the relevant universe for comparison. That is, the racial composition of defendant's work force should be compared: (1) to the population possessing the necessary qualifications for the job; (2) in the relevant labor market area. *Hazelwood School District* v. *United States, supra*, at 308 & n.17; *EEOC* v. *Chesapeake & Ohio Ry.*, 577 F.2d 229, 233 (4th Cir. 1978).

When the job skill involved is one that many persons possess or can fairly readily acquire, it is proper to compare the racial

composition of the employer's entire work force with the racial composition of the general areawide population or work force. However, when special qualifications are required to fill particular jobs, comparisons to the general population or work force are of questionable value. Rather, the comparison should be made to the smaller group of individuals who are qualified by education or training for the particular jobs. *Hazelwood School District* v. *United States, supra*, at 308 n.13; *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620-621 (1974); *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403, 406 & n.7 (4th Cir. 1977).

No rigid formula governs the determination of the relevant labor market area. Generally, the appropriate area is that from which the work force reasonably should be drawn. *Haykel* v. *G. F. L. Furniture Leasing Co.*, 76 F.R.D. 386, 395 (N.D. Ga. 1976). The Court's ultimate determination of the area may be the product of various factors, including the following: standard metropolitan statistical area (SMSA) data; the hiring policies of other employers in nearby areas; and the distances which individuals might be willing to travel to work for defendant. See, *e.g.*, *Hazelwood School District* v. *United States, supra*, at 311-12; *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 275 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *EEOC* v. *E. I. duPont de Nemours and Co., Chestnut Run and Affiliated Facilities*, 445 F. Supp. 223, 236-38 (D. Del. 1978).

1. *The Qualified Work Force*

The EEOC first compares the racial composition of defendant's overall work force to that of the general population and the general available work force. Then the Commission purports to compare the racial composition of specific job categories at the Suffolk and Portsmouth branches with the smaller group of qualified individuals in each category. Defendant argues that EEOC has erroneously used general labor force availability, rather than availability for jobs requiring special qualifications, as the standard of comparison. Furthermore, defendant contends, the

use of work force figures and percentages presents a static, misleading, unrealistic, and irrelevant picture.

Little statistical evidence was presented in testimony at trial. No expert statistician was called by either party. Thus, the statistical evidence before the Court consists almost entirely of stipulation exhibits and the analyses contained in each party's proposed findings of fact and conclusions of law.

The EEOC analyzed the racial composition of defendant's overall work force and then proceeded to examine specific job categories -- officials and managers, office and clerical workers, service workers, and craftsmen.[29] Defendant criticizes the use of these categories, especially that of general labor force availability, because the jobs at defendant's branches require special qualifications. To some extent, the Court agrees. The use of general area wide population and work force data is indeed highly questionable in this case. While some of the jobs in controversy here (service workers, for example) involve skills that "many persons possess or can fairly readily acquire,"[30] many positions -- tellers, for example -- appear to require some special education or training. Yet, aside from the requirement that applicants possess a high school diploma or its equivalency,[31] and the preference for

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[29] The EEOC's decision to use the craftsmen category as a basis of comparison is puzzling. It is true, as EEOC says, that the Portsmouth branches have never employed blacks as craftsmen (the Suffolk branches have never hired a craftsman). See Stip. Ex. #54-87. But the Portsmouth branches did not employ any craftsmen until mid-1971 or later, and have had only one craftsman on the work force in all succeeding years. *Id.* The small sample size of the craftsmen category makes any comparison meaningless. *Teamsters*, *supra*, at 340 n.20. Consequently, the craftsmen category is not a suitable basis for comparison.

[30] See *Hazelwood School District* v. *United States*, *supra*, at 308 n.13 (citing ability to drive a truck).

[31] Stip. Par. #30. Ordinarily, in view of this educational requirement, those without a high school diploma or its equivalent should have been excluded from the general population and work force data. However, neither party has identified a single applicant who was rejected for failure to meet this requirement. *Id.*

personnel with previous experience (described *supra*), there has been no showing that special skills are required for positions in defendant's facilities. Accordingly, the use of general population and work force data is not wholly improper here.

The Court is somewhat disturbed by the EEOC's use of categories here. The Commission has classified virtually all of defendant's employees into three categories -- officials and managers, service workers, and office and clerical workers. The first two categories present no problems; executives and service workers are limited in number and relatively easy to identify. (See Stip. Ex. #54-87).

The "office and clerical" category, however, seems overbroad and over-inclusive. It encompasses a variety of positions, each of which might require special qualifications.[32] Some testimony suggested that, because certain positions in the "office and clerical" category require special qualifications, they may not properly be comparable to other positions within that category. For example, normally, defendant did not consider individuals for positions which they had not stated as "desired" on their applications. (Tr. 202). And the vice-president of defendant in charge of personnel stated that "when a person applies for a messenger's position, I don't know that they are at a caliber [sic] for a teller position." (Tr. 117).

Nonetheless, the Court finds that the use of a broad "office and clerical" category as a standard for comparison is not inappropriate here. There was no direct evidence that an applicant must possess special qualifications (other than the high school degree discussed *supra)* to be considered for a particular "office and clerical" position. Defendant has hired individuals without previous teller experience and trained them after hire. (Stip. Par. #27). In some instances, applicants have been hired for positions other than

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[32] Among the positions in defendant's facilities which appear to fall within the "office and clerical" category are the following: proof operators, tellers, mail clerks, new accounts receptionists, microfilmers, trust clerks, runners, and mail clerks. See Stip. Ex. #88.

those positions specifically named on their applications. (Stip. Par. #25). Accordingly, for purposes of the comparison, the Court finds acceptable the "office and clerical" category cited by the EEOC.

2. *The Relevant Labor Market Area*

At trial, a spokesperson for the EEOC appeared to define the relevant labor market area for defendant's Portsmouth branches as the Norfolk-Portsmouth SMSA, the independent incorporated City of Chesapeake, and the independent incorporated City of Portsmouth. She defined the relevant area for the Suffolk branches as the Norfolk-Portsmouth SMSA, Nansemond County, and the independent incorporated City of Suffolk. (Tr. 788).

In its proposed findings of fact and conclusions of law, however, the EEOC now proposes a slightly different definition. According to the Commission, the relevant area containing the available work force for the Portsmouth branches is comprised of the Norfolk-Portsmouth SMSA, the independent incorporated City of Portsmouth, and the State of Virginia. The EEOC defines the relevant area for the Suffolk branches as the independent incorporated City of Suffolk, Nansemond County, and the State of Virginia. (Plaintiff's Proposed Findings of Fact and Conclusions of Law, pp. 11-16). Curiously, defendant neither challenges the EEOC's seemingly inconsistent approaches nor attempts to define a relevant market area.[33]

In attempting to define the relevant labor market area, the Court has taken judicial notice of the fact that the Portsmouth and Suffolk branches are part of a large metropolitan area dominated by five independent incorporated cities -- Norfolk, Portsmouth, Suffolk, Chesapeake, and Virginia Beach. These cities, while separate and located at varying distances from one another, are

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[33] In its 1973 affirmative action program, defendant defined the employment market for all of its branches as "the metropolitan areas of Chesapeake, Virginia Beach, Nansemond, Norfolk and Portsmouth." (Stip. Ex. #52).

connnected by a network of limited-access highways. Long-distance commuting to jobs from one city to another is not uncommon in the area.

Other factors, however, narrow the scope of the relevant labor market. Defendant prefers to hire applicants living close to the branch where they wish to work. (Tr. 289, 998). The Court takes judicial notice of the fact that some incorporated cities (Chesapeake, for example) are actually large geographic areas, portions of which are more than twenty miles from other cities. Considering the rather low wages that the bank pays for many positions (discussed *infra*), it seems unlikely that residents of the southern portions of Chesapeake would be willing to commute twenty miles to a job in Portsmouth. For the same reasons, few residents of Norfolk and Portsmouth would travel the rather long distance to Suffolk.

Therefore, the Court finds that the relevant labor market area for defendant's Portsmouth branches is comprised of the City of Portsmouth and the Norfolk-Portsmouth SMSA. The Court further finds that the relevant labor market area for the Suffolk branches is comprised of the City of Suffolk and Nansemond County. The other areas suggested -- the State of Virginia, the City of Chesapeake, and (with respect to the Suffolk branches) the Norfolk-Portsmouth SMSA -- are not those from which the work force for the Portsmouth and Suffolk branches would reasonably be drawn, for the reasons already stated.

3. *The Data*

SUFFOLK

Between 1968 and 1975, blacks comprised the following percentages of defendant's work force at the Suffolk branches as opposed to the percentages of blacks in the general available work force in the relevant labor market area:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nansemond County
1968	3	8.3	31.0	47.9
1969	3	11.1	31.0	47.9
1970	4	13.8	31.0	47.9
1971	5	17.9	31.0	47.9
1972	5	17.2	31.0	47.9
1973	3	9.7	31.0	47.9
1974	2	8.3	31.0	47.9
1975	2	10.5	31.0	47.9

(Stip. Ex. #46-51, 54-87).[34]

During the same period (1968-1975), blacks comprised the following percentages of the officials and managers working for defendant's Suffolk branches, as oppoosed to the percentage of blacks in the available officials and managers work force:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nansemond County
1968	0	0.0	8.0	10.9
1969	0	0.0	8.0	10.9
1970	0	0.0	8.0	10.9
1971	0	0.0	8.0	10.9
1972	0	0.0	8.0	10.9
1973	0	0.0	8.0	10.9
1974	0	0.0	8.0	10.9
1975	0	0.0	8.0	10.9

[34] All of the comparative data in this section will be drawn from Stip. Ex. #46-51 and 54-87.

Neither party attempted to consolidate the data from Suffolk and Nansemond County. This is unfortunate, since it appears that Nansemond County was annexed by, and made a part of, the City of Suffolk during the 1970's. However, because the percentage of blacks in the work force of defendant in either branch was usually lower that the percentage in any of the areas comprising the relevant market areas, the failure to consolidate the figures is not significant.

The number and percentages of blacks working as office and clerical workers in the Suffolk branches, as opposed to the percentages of blacks in the available office and clerical work force, during the period in question was as follows:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nanesmond County
1968	0	0.0	10.3	22.5
1969	0	0.0	10.3	22.5
1970	1	5.3	10.3	22.5
1971	2	11.1	10.3	22.5
1972	2	10.0	10.3	22.5
1973	1	4.8	10.3	22.5
1974	0	0.0	10.3	22.5
1975	0	0.0	10.3	22.5

Between 1968 and 1975, blacks comprised the following percentage of service workers[*] employed at the Suffolk branches, as opposed to the percentages of blacks in the available service worker work force:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Suffolk	Nansemond County
1968	3	100.0	44.8	58.1
1969	3	75.0	44.8	58.1
1970	3	75.0	44.8	58.1
1971	3	75.0	44.8	58.1
1972	3	100.0	44.8	58.1
1973	2	100.0	44.8	58.1
1974	2	100.0	44.8	58.1
1975	2	100.0	44.8	58.1

[*] Until 1972, defendant listed service workers as "laborers" or "service" on the EEO-1 form that it supplied to the EEOC. See Stip. Ex. #54-87.

PORTSMOUTH

Between 1968 and 1975, blacks comprised the following percentages of the total work force at all of the Portsmouth branches, as opposed to the percentages of blacks in the general available work force in the relevant labor market area:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	7	5.6	36.0	25.1
1969	6	4.4	36.0	25.1
1970	8 [46]	5.4	36.0	25.1
1971	11	7.1	36.0	25.1
1972	15	8.9	36.0	25.1
1973	15	9.1	36.0	25.1
1974	15	8.4	36.0	25.1
1975	16	10.4	36.0	25.1

The following are the number and percentage of blacks employed by defendant as officials and managers in the Portsmouth branches, as opposed to the percentage of blacks in the available officials and managers work force:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	0	0.0	6.9	4.8
1969	0	0.0	6.9	4.8
1970	0	0.0	6.9	4.8
1971	0	0.0	6.9	4.8
1972	0	0.0	6.9	4.8
1973	1	2.8	6.9	4.8
1974	1	2.8	6.9	4.8
1975	1	2.7	6.9	4.8

[46] For some years, the Court computed the number of blacks in the Portsmouth branches by subtracting the number of blacks listed by defendant as employed in Suffolk from the total number of blacks that defendant listed as employed in all branches. See Stip. Ex. #54-87.

Black office and clerical employees at the Portsmouth branches comprised the following percentage of defendant's Portsmouth office and clerical force, as opposed to the available office and clerical force in the area:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	1	1.1	21.5	13.9
1969	0	0.0	21.5	13.9
1970	3	3.2	21.5	13.9
1971	5	4.9	21.5	13.9
1972	8	6.5	21.5	13.9
1973	7	5.9	21.5	13.9
1974	7	5.3	21.5	13.9
1975	10	9.3	21.5	13.9

Finally, blacks comprised the following percentages of total service workers at the Portsmouth facilities and the available service worker work force:

	Number and Percentage of Blacks		Percentage of Blacks in Available Work Force	
	Number	Percentage	Portsmouth	Norfolk - Portsmouth SMSA
1968	6	85.7	59.2	45.3
1969	6	100.0	59.2	45.3
1970	4	80.0	59.2	45.3
1971	5	83.3	59.2	45.3
1972	7	87.5	59.2	45.3
1973	7	87.5	59.2	45.3
1974	7	87.5	59.2	45.3
1975	5	83.3	59.2	45.3

CONSOLIDATION AND ANALYSIS

Since the EEOC includes both the Portsmouth and the Suffolk branches in its allegation of a pattern or practice of discrimination, the Court believes that the just-described figures should be consolidated in order to present a "complete picture." Thus, the following are the consolidated firgures for each category.

Figure I

Total Work Force

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	10	6.3	31.0	47.9	36.0	25.1
1969	9	5.5	31.0	47.9	36.0	25.1
1970	12	6.8	31.0	47.9	36.0	25.1
1971	16	8.7	31.0	47.9	36.0	25.1
1972	20	10.2	31.0	47.9	36.0	25.1
1973	18	9.2	31.0	47.9	36.0	25.1
1974	17	8.1[17]	31.0	47.9	36.0	25.1
1975	18	10.0	31.0	47.9	36.0	25.1

Figure II

Officials and Managers

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	0	0.0	8.0	10.9	6.9	4.8
1969	0	0.0	8.0	10.9	6.9	4.8
1970	0	0.0	8.0	10.9	6.9	4.8
1971	0	0.0	8.0	10.9	6.9	4.8
1972	0	0.0	8.0	10.9	6.9	4.8
1973	1	2.3	8.0	10.9	6.9	4.8
1974	1	2.4	8.0	10.9	6.9	4.8
1975	1	2.3	8.0	10.9	6.9	4.8

[17] 1974 and 1975 percentages are based upon figures which include 8 to 10 personnel who were employed in defendant's Norfolk and Chesapeake branches -- neither of which have employed blacks. See Stip. Ex. #54-87.

Figure III
Office and Clerical

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	1	0.8	10.3	22.5	21.5	13.9
1969	0	0.0	10.3	22.5	21.5	13.9
1970	4	3.5	10.3	22.5	21.5	13.9
1971	7	5.8	10.3	22.5	21.5	13.9
1972	10	7.0	10.3	22.5	21.5	13.9
1973	8	5.8	10.3	22.5	21.5	13.9
1974	7	4.5	10.3	22.5	21.5	13.9
1975	10	7.9	10.3	22.5	21.5	13.9

Figure IV
Service Workers

	No. & % of Blacks		% of Blacks in Available Work Force			
	No.	%	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
1968	9	90.0	44.8	58.1	59.2	45.3
1969	9	90.0	44.8	58.1	59.2	45.3
1970	7	77.8	44.8	58.1	59.2	45.3
1971	8	80.0	44.8	58.1	59.2	45.3
1972	10	91.0	44.8	58.1	59.2	45.3
1973	9	90.0	44.8	58.1	59.2	45.3
1974	9	90.0	44.8	58.1	59.2	45.3
1975	7	87.5	44.8	58.1	59.2	45.3

The Court finds, with the exception of the service worker category, that there has been consistent underrepresentation of blacks on the work force of defendant between 1969 and 1975.

Indeed, in 1969, the only blacks employed by defendant were service workers. It is true that since 1969, the percentage of blacks in the overall work force has generally increased. The fact remains, however, that the percentage of blacks in defendant's total work force has remained at least 15 percent below the percentage of blacks in the available work force of any of the communities comprising the two relevant labor market areas. The same is true of the specific job categories. Only one black has worked as an official or manager for defendant, comprising little more than 2 percent of the officials and managers.[38] While the percentage of blacks in the office and clerical category has increased from 0.8 in 1969 to 7.9 in 1975, the actual percentages were constantly below the percentages of blacks in the available work force. The percentage of blacks in defendant's service workers force, in contrast, has always been greater than the percentage of blacks in the available service worker force in the relevant labor market area. Until 1975, at least 50 percent of the blacks in defendant's employ were service workers.

To a limited extent, these figures are misleading. The number of service workers in the Suffolk and Portsmouth branches has been rather small.[39] The total number of officials and managers working in the Suffolk branches is also quite small; no more than 7 have ever been employed, and in most years between 1969 and 1975, the number has been 4 or 5. Finally, the total number of people in office and clerical positions by the Suffolk branches has never exceeded 21 in any year since 1968 (between 1969 and 1975, the average number of office and clerical positions was 18).

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[38] This figure is lower than the percentage of blacks in the available officials and managers work force of any city in the relevant areas. Moreover, only one black has been employed as an official or manager at any given time, even though the number of officials and managers in defendant's work force increased from 28 in 1969 to 44 in 1975. Stip. Ex. #54-87.

[39] The maximum number of service workers employed by defendant was 11 in 1972. Portsmouth branches have never employed more than 8, and Suffolk branches more than 4, service workers. Stip. Ex. #54-87.

Thus, the underrepresentation in those instances may not be as chronic as it first appears.[40]

Nonetheless, the fact remains that from 1969 to 1975, blacks were underrepresented in defendant's work force, not only in the work force generally but also in the specific categories of officials and managers and office and clerical personnel. The Court cannot agree with defendant that these comparisons are "irrelevant." *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), held that comparative statistics showing gross statistical disparities are prima facie proof of a pattern or practice of discrimination. *Id.* at 308-09.[41] The Court finds, therefore, that the statistical evidence presented here by the EEOC is prima facie statistical proof of a pattern or practice of discrimination.

Prima facie statistical proof can be rebutted by statistics dealing with the hiring practices of defendant between 1969 and 1975. *Id.* at 309. Defendant has attempted to rebut with applicant flow data and with the standard deviation analysis described by the United States Supreme Court in *Castaneda* v. *Partida*, 430 U.S. 482, 496-97 n.17 (1977). Statistical evidence of this type is proper rebuttal evidence, although its weight is a matter for this Court to consider. See, *e.g.*, *Hazelwood School District* v. *United States*, *supra*, at 309-13 & n.21; *International Brotherhood of Teamsters* v. *United States*, *supra*, at 360; *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 635 n.16 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3650 (1979); *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403, 406 (4th Cir. 1977).

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[40] For example, although Suffolk branches have never employed a black official or manager, the total number of officials in the Suffolk branches has rarely exceeded 4 or 5. Since the maximum percentage of blacks in the available officials and managers work force is only 10.9, the underrepresentation would be .436 or .545 of a manager.

[41] *Hazelwood* held that even a 4 percent disparity was, on its face, substantial. 433 U. S. at 308-09.

B. *Applicant Flow Data*

Defendant has submitted applicant flow data purporting to compare those who were hired with all those who submitted an application for employment in the Suffolk and Portsmouth branches. For Suffolk, the figures are the following:

Figure I -- Suffolk Branches

	Number of Applications		Number of Hirees	
	White	Black	White	Black
1969	23	7	5	1
1970	41	6	3	0
1971	59	20	1	1
1972	11	5	4	2
1973	60	19	7	0
1974	62	35	6	1
1975	40	7	6	2
Total	296	99	32	7

These figures translate into the following percentages:

Figure II -- Suffolk Branches

	Percentage of Applications		Percentage of Hirees	
	White	Black	White	Black
1969	76.7	23.3	83.3	16.7
1970	87.2	12.8	100.0	0.0
1971	74.7	25.3	50.0	50.0
1972	68.7	31.3	66.7	33.3
1973	75.9	24.1	100.0	0.0
1974	63.9	36.1	85.7	14.3
1975	85.1	14.9	75.0	25.0
	74.9	25.1	82.1	17.9

(Stip. Par. #33, 34; Stip. Ex. #22, 39, 42)

Applicant flow data for the Portsmouth branches consists of the following:

Figure III -- Portsmouth Branches

	Number of Applications		Number of Hirees	
	White	Black	White	Black
1969	(not available)		(not available)	
1970	(not available)		(not available)	
1971	(not available)		(not available)	
1972	(not available)		(not available)	
1973	(not available)		55	11
1974	(not available)		65	12
1975	379	115	24	3

Translated into percentages, the Portsmouth data is as follows:

Figure IV -- Portsmouth Branches

	Percentage of Applications		Percentage of Hirees	
	White	Black	White	Black
1969	(not available)		(not availalbe)	
1970	(not available)		(not available)	
1971	(not available)		(not available)	
1972	(not available)		(not available)	
1973	(not available)		83.3	16.7
1974	(not available)		84.4	15.6
1975	76.7	23.3	88.9	11.1

(Stip. Par. #35, 36; Stip. Ex. #40, 45)

1. *The Suffolk Figures: Issues*

The EEOC bitterly protests that the applicant-flow data for Suffolk should be afforded no weight because the 395 applications allegedly constitute only 46 percent of the actual number of applications received by the Suffolk branches between 1969 and 1975. More than 500 applications, says the EEOC, are missing or unavailable.

Defendant's application figures for the Suffolk branches do lend some support to the contention that more than 395 applications were filed between 1969 and 1975. It is puzzling that the number of applications varied so substantially from year to year.[42] No explanation has been offered for this disparity.

The Court is persuaded, however, that the applicant-flow figures for Suffolk are generally reliable. In the Order on Final Pre-Trial Conference, the parties stipulated: "After a review of the available applications filed with American National Bank in Suffolk from 1969 through 1975 and in Portsmouth during 1975, EEOC requested copies of 398 or approximately 46% of the available 860-900 applicants." (Stip. Par. #13; emphasis added).

According to the EEOC, these 398 "requested" applications consisted of 175 drawn from the 356 "available" 1969-1975 applications from Suffolk[43] and 223 drawn from the 505[44] "available" 1975 applications from Portsmouth. (Stip. Ex. #22). The parties also stipulated that the EEOC "counted 356 total applications of persons not hired" in Suffolk between 1969 and 1975 and that 493[45] applications were received in Portsmouth in 1975. (Stip. Par. #33, 35).

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[42] From 1969 to 1975, the number of applications filed each year in Suffolk, and the percentage increase or decrease from the preceding year, were:

	Number	Change from Preceding Year
1969	30	--------
1970	47	56.7% increase
1971	79	68.1% increase
1972	16	80.0% decrease
1973	79	393.8% increase
1974	97	22.8% increase
1975	47	51.5% decrease

[43] When the 39 individuals who were hired in Suffolk are added to the 356 "available" applications, the total number of applicants is 395 -- the same number as that in the applicant-flow data.

[44] The parties later stipulated that the actual number of applications filed in Portsmouth during 1975 was 494. (Stip. Ex. #43; see Stip. Par. #34-36).

On the basis of these facts, the Court concludes that the 46 percent figure in paragraph 13 of the Order on Final Pre-Trial Conference refers to the 398 Portsmouth and Suffolk applications requested from defendant by the EEOC, not to the 395 Suffolk applications which are included in the applicant-flow analysis here. The Court simply cannot construe paragraphs 13 and 33 of the Order as stating that the 356 applications (395, if the 39 Suffolk hirees are included) are but 46 percent of all applications filed in Suffolk. Had 500 Suffolk applications been "unavailable," surely the Commission would have so stated explicitly in the Order or otherwise brought that fact to the attention of this Court.[46] Yet there is no indication in the record that 500 Suffolk applications were "unavailable."[47]

Concededly, the EEOC did not stipulate in the Order that only 395 applications were filed in Suffolk. Rather, it stipulated that "it had counted" 356 applications of persons not hired in Suffolk and 39 Suffolk hirees. (Stip. Par. #33, 34). And, as the Court has already noted, the annual application figures raise the possibility that the figures may not be complete. But the Court rejects the argument of the EEOC, in the absence of other supporting evidence, that the figures supplied by defendant represent only 46 percent of all applications filed. The applicant-flow analysis for Suffolk, therefore, does carry weight.

[45] The figure of 493 does not include one individual who was hired in Portsmouth during 1975. (Stip. Par. #35, 36).

[46] Commission regulations require that, when a charge of discrimination has been filed, the employer preserve all personnel records relevant to the charge until final disposition of the charge. 29 C. F. R. § 1602.14(a) (1976).

[47] During her testimony, Marilyn Stephens of the EEOC, who analyzed the applications, did not suggest that over 500 Suffolk applications were missing or unavailable. (Tr. 795-807). Indeed, when the EEOC was attempting to introduce an exhibit which (according to Ms. Stephens) was merely a summary of Stip. Ex. #39 & 40, counsel for the EEOC stated: "We believe it [the proferred exhibit] reflects those applicants, the total applicants, and the percentage of black applicants for the years 1969 through 1975." (Tr. 802, 807) (emphasis added). When the exceptions noted in Stip. Par. #34 are taken into account, the application figures for Suffolk in Stip. Ex. #39 and 40 equal those given by defendant.

2. *Portsmouth Figures: Issues*

The applicant-flow analysis would be incomplete without consideration of the 1975 application figures for the Portsmouth branches. However, the EEOC argues that these figures carry no probative value as to pre-1975 practices. Moreover, the Commission points out that defendant has not furnished data concerning applications filed in Portsmouth before 1975.

The Court cannot agree that the 1975 figures for Portsmouth are without probative value. This action alleges a pattern or practice of discrimination by defendant in all its branches between 1969 and 1975. Obviously, the hiring practices of the Portsmouth branches during this period are relevant where, as here, defendant attempts to show that its hiring practices were free of discrimination during the period in controversy. See, *e.g.*, *Hazelwood School District* v. *United States*, *supra*, at 309; *International Brotherhood of Teamsters* v. *United States*, *supra*, at 360.

Evidently, the Commision is urging this Court to disregard the 1975 statistics and to draw an adverse inference against defendant because defendant has discarded or destroyed all Portsmouth applications filed before 1975. The Court declines to accept this invitation. Admittedly, destruction of relevant records is sometimes sufficient to raise an unfavorable inference when a defendant has acted in bad faith. *E.g.*, *Boyd* v. *Ozark Air Lines, Inc.*, 568 F.2d 50, 53 (8th Cir. 1977); *Vick* v. *Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975).

In this case, however, the evidence is overwhelming that the disposal or destruction of pre-1975 Portsmouth records was not done in bad faith. Indeed, the Court finds that defendant acted in good-faith reliance on the actions and pronouncements of the Commission. As the Court has already described during its discussion of the jurisdictional issue, *supra*, between 1969 and 1974 the EEOC confined its investigation to the activities of the Suffolk branches. The 1974 reasonable cause determination stated that Portsmouth hiring statistics were "irrelevant to employment at [the] Suffolk branch." (Stip. Ex. #16, p. 3, n. 1). In such

circumstances, it was not only reasonable, but logical, for defendant to conclude that the EEOC had not found any involvement by the Portsmouth branches in the alleged discrimination and that maintenance of Portsmouth applications filed more than six months before was no longer necessary.[48] Certainly the failure of Sandra Holland to request a notice of her right to sue by the end of 1974,[49] and the failure of the Commission to file a civil action during 1975,[50] would have led reasonable men to believe that by the beginning of 1976 "final disposition" of the charge had occurred.

In the view of this Court, the EEOC, not the defendant, has acted in bad faith here. According to the evidence before the Court, for more than five years the EEOC led defendant to believe that the Portsmouth branches were not suspected of discriminatory practices. Then, more than a year after Sandra Holland had failed to request a Notice of Right to Sue, the Commission brought this action. No explanation has been furnished by the Commission for its course of conduct. In pointing an accusatory finger at defendant, the EEOC seeks to convince the Court that defendant's reliance on the pre-1976 investigations and reports of the Commission was actually an act of bad faith. There is absolutely no merit in the EEOC's argument. Accordingly, the Court will consider the 1975 application statistics for Portsmouth and will not consider the absence of pre-1975 application statistics as a factor adverse to defendant.

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[48] At the time of the reasonable cause determination, the Commission required that application forms be preserved by the employer for a six-month period. However, an employer against whom a charge of discrimination had been filed was required to maintain all records relevant to the charge until final disposition of the charge or action. See 29 C. F. R. § 1602.14(a) (1976).

[49] In a letter dated August 22, 1974, the EEOC informed Ms. Holland that conciliation efforts had failed and that she could request a Notice of Right to Sue. Had Ms. Holland requested the Notice, she could have instituted suit within 90 days after she received it. 42 U. S. C. § 2000e-5(f)(1); *Garner* v. *E. I. duPont de Nemours & Co.*, 538 F.2d 611 (4th Cir. 1976).

3. *Analysis*

The Suffolk application figures from 1969 to 1975 give rise to no inference of a pattern or practice of discrimination. In Suffolk between 1969 and 1975, 17.9 percent of hirees (the total number of which, 39, was relatively small) were black. Had the percentage of black hirees in Suffolk matched the percentage of black applicants, defendant would have hired 10 blacks rather than the 7 actually hired -- a difference of only three. Furthermore, in three of the seven years in question -- 1971, 1972, and 1975 -- the percentage of hirees who were black exceeded the percentage of total applicants who were black.

The applicant-flow analysis for Portsmouth covers only one year -- 1975. In that year only 11.1 percent of hirees were black, as opposed to 23.3 percent of the total number of applicants. The 11.2 percent disparity is somewhat misleading, however, because of the small number of hirees. Had the percentage of black hirees been equal to that of black applicants, the 27-person hiree force would have contained six blacks, rather than three.

Of course, the applicant-flow data furnished by defendant is not free of flaws. The application statistics are gross figures; consequently, the Court cannot discern the number of applicants who applied for a particular position, who met the qualifications for that position, or who would have been considered for the position.[51] Significantly, however, the Commission has not

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[50] The EEOC is not precluded from bringing a civil action after it issues a right-to-sue letter to the charging party. *E.g.*, *EEOC* v. *Upjohn Corp.*, 445 F. Supp. 635, 639-41 (N.D. Ga. 1977).

[51] Of the 39 positions filled in Suffolk between 1969 and 1975, 2 were official-managerial, 2 were janitorial, and 35 were office-and-clerical. In 1975, the Portsmouth branches filled 2 managerial, 2 janitorial, and 23 office and clerical positions. It is impossible to determine from the gross statistics how many applicants were sufficiently well educated to be considered for the managerial positions. See, Stip. Ex. #37, 42; Tr. 948-49. Noteworthy is the fact that of 106 blacks whose applications it reviewed, the EEOC determined that 54 -- or 51 percent -- of them were not victims of discrimination. (Stip. Par. #14, 15, 18).

contested the reliability of the statistics in these respects, nor has it attempted to classify the applications in any way.

The actual number of hiring decisions by the Portsmouth and Suffolk branches must have been substantial. Between 1969 and 1975, 39 persons were hired in Suffolk; between 1973 and 1975, 170 persons were hired in Portsmouth. But applicant-flow data is complete with regard to Suffolk branches and, for 1975 alone, the Portsmouth branches. As stated *supra*, the unavailability of the pre-1975 Portsmouth applications is a matter for which the EEOC, not defendant, is responsible.

The Court concludes that the applicant-flow analysis rebuts the allegation that racial discrimination was defendant's standard operating procedure. In Suffolk, 7 blacks were hired between 1969 and 1975. In all but two of those years, one black teller was hired annually. (Stip. Ex. #37, 42). Had the percentage of blacks in the hiree force matched that of blacks in the applicant force, three additional blacks would have been hired between 1969 and 1975. In other words, the Suffolk branches should have hired an average of .429 of a black employee each year in additional to the number of blacks actually hired.

Portsmouth figures for 1975 also lend no support to the EEOC. If the 1975 Portsmouth hiree force had been 23.3% black, rather than 11.1%, three additional blacks would have been hired, for a total of six. Admittedly, if this 12 percent statistical disparity had been shown to persist in Portsmouth throughout the seven-year period, the Court might well have inferred discriminatory intent.[32] But the 1975 Portsmouth figures constitute only a single part of the hiring process throughout this period -- and the absence of the remainder is attributable to the actions of the Commission.

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[32] It appears that the 27-person hiree force in Portsmouth consisted of two management trainees, two janitors, and twenty-three office and clerical personnel. (Stip. Ex. #37, 45). Both janitors were black. Only one member of the office and clerical hiree force was black. *(Id.)*

The applicant-flow data that defendant has furnished rebut the allegations of discrimination. Furthermore, the number of hiring decisions which can be compared to application rates in this analysis (39 in Suffolk from 1969 to 1975 -- an average of 5.3 per year -- and 24 in Portsmouth for 1975) are too few to justify an inference that defendant has engaged in a regular practice of discrimination. See *International Brotherhood of Teamsters* v. *United States*, *supra*, at 360. But even if the applicant-flow data only weakens the EEOC's statistical evidence, a standard deviation analysis of defendant's work force and hirees adds enough effective rebuttal weight to tip the scales against the EEOC.

C. *The Castaneda-Hazelwood Analysis*

Defendant contends that a standard deviation analysis of its hiring figures which was authorized by *Castaneda* v. *Partida*, 430 U. S. 482 (1977), and by *Hazelwood School District* v. *United States*, 433 U. S. 299 (1977), refutes any inference of discrimination. The Court agrees that the *Castaneda-Hazelwood* analysis lends no support to the EEOC's allegations.

The *Castaneda-Hazelwood* analysis measures the significance of statistical disparities through the calculation of "standard deviations" as a measure of predicted fluctuations from the expected value of a sample. In this case, the measure of the predicted fluctuations is the square root of the product of the total number in the relevant sample, times the probability of selecting a qualified and available black individual, times the probability of selecting qualified and available persons of other races. As a general rule, if the difference between the expected value and the observed value exceeds two or three standard deviations, then the hypothesis that defendant hired employees without regard to race would be suspect. *Castaneda*, *supra*, at 496-97; *Hazelwood*, *supra*, at 308-09, n. 14. In other words:

$$\text{Number of Standard Deviations} = \frac{\text{Number of Expected (Random) Black Selections (}i.e.\text{, black percentage of the qualified and available labor pool}^{[1]} \times \text{Total Selections)} - \text{Number of Actual Black Selections}}{\sqrt{\text{Number of Total Selections} \times \text{Percentage of Blacks in Qualified and Available Labor Pool} \times \text{Percentage of Whites in Qualified and Available Labor Pool}}}$$

1. *Work Force Statistics*

The standard deviation analysis may be applied to hiring statistics. But *Hazelwood* also held that the analysis may be employed to analyze disparities between the percentage of blacks in the qualified available labor pool and the percentage of blacks in the employer's work force. *Id.* at 308-09 n.14. Therefore, the Court will analyze both the work force and the hirees of defendant under the standard deviation analysis. With respect to both sets of figures, the Court will use the following percentages of blacks in the labor pool for each category as the basis for calculating the expected value:

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[1] The Court cannot agree with defendant that the applicant rates for blacks and whites are the proper figures to be used in the *Castenada-Hazelwood* analysis. In *Hazelwood*, the Supreme Court used only the racial percentages of the qualified and available labor pool in the relevant labor market area in the standard deviation analysis. *Id.* at 308-09 n.14, 311 n.17. If applicant percentages, rather than qualified labor pool percentages, were to be used, then *Castaneda* -- a jury-selection case -- would have analyzed the population comprised of those wishing or applying to be jurors, rather than the general population figures that were employed. See *id.* at 496-97 n.17. Since the *Hazelwood* and *Castaneda* decisions, other courts have consistently used figures concerning the available qualified labor pool in the standard deviation analysis. *E.g.*, *Scott* v. *University of Delaware*, 455 F. Supp. 1102, 1110, 1127 (D. Del. 1978); *EEOC* v. *E. I. duPont de Nemours and Co., Chestnut Run and Affiliated Facilities*, 445 F. Supp. 223, 238-41 (D. Del. 1978).

	Suffolk	Nansemond	Portsmouth	Norfolk - Portsmouth SMSA
General Work Force	31.0%	47.9%	36.0%	25.1%
Officials and Managers	8.0%	10.9%	6.9%	4.8%
Office and Clerical	10.3%	22.5%	21.5%	13.9%

Because the relevant labor market areas for the Suffolk and Portsmouth branches are totally different, and because within each labor market area defendant maintained several branches, the Court has analyzed statistics for the Suffolk and Portsmouth branches separately. For the same reasons, the Court has made separate standard deviation analyses for both jurisdictions comprising each labor market area, using the work-force statistics for each jurisdiction. For example, in analyzing the 30-person work force in the Suffolk branches in 1969, the Court has calculated two standard deviation figures: one using the percentage of blacks in the general labor pool in the City of Suffolk (31.0 percent) and one using the 47.9 percent figure for Nansemond County. Using the City of Suffolk as a yardstick for that year, the expected number is 9, the actual number is 3, one standard deviation is 2.5, and the difference between the actual and expected numbers of black employees is between 2 and 3 standard deviations. Thus, the following is the difference between the expected number and actual number of black employees in the total work force of the Suffolk and Portsmouth branches from 1968 to 1975. The percentages (in parentheses) listed adjacent to each community list the proportion of blacks in the relevant qualified labor force in each community.

NUMBER OF STANDARD DEVIATIONS

Total Work Force

	Suffolk Branches		Portsmouth Branches	
	Suffolk (31.0%)	Nansemond (47.9%)	Portsmouth (36.0%)	Norfolk - Portsmouth SMSA (25.1%)
1968	3-4	5-6	7-8	5-6
1969	2-3	4-5	5-6	5-6
1970	2-3	4-5	7-8	5-6
1971	1-2	3-4	7-8	5-6
1972	2-3	3-4	7-8	5-6
1973	2-3	4-5	7-8	5-6
1774	2-3	4-5	8-9	5-6
1975	1-2	3-4	6-7	4-5

Under *Castaneda* and *Hazelwood*, these statistics cast suspicion on defendant's claim that employees are hired without regard to race. In almost every year, in almost every jurisdiction comprising the relevant labor market areas, the difference between the expected number of blacks hired and the actual number of black hirees has been greater than two or three standard deviations.

Yet, the overall work force statistics provide a misleading picture. The EEOC complains that blacks are underrepresented in two job categories -- official-managerial and office-and-clerical -- which, when taken together, constitute 80 percent (and often 90 percent) of the total work force in the Suffolk and Portsmouth branches. The EEOC itself concedes that in analyzing each job category, it is preferable to use the percentages of qualified and available blacks in that category, rather than general labor force statistics. With respect to the employees working as officials and managers, the following were the differences between the actual and expected numbers of black officials and managers in the Suffolk and Portsmouth branches:

NUMBER OF STANDARD DEVIATIONS

Official-Managerial Employees

	Suffolk Branches		Portsmouth Branches	
	Suffolk (8.0%)	Nansemond (10.9%)	Portsmouth (6.9%)	Norfolk-Portsmouth SMSA (4.8%)
1968	0-1	0-1	1-2	1-2
1969	0-1	0-1	1-2	1-2
1970	0-1	0-1	1-2	1-2
1971	0-1	0-1	1-2	1-2
1972	0-1	0-1	1-2	1-2
1973	0-1	0-1	1-2	0-1
1974	0-1	0-1	1-2	0-1
1975	0-1	0-1	1-2	0-1

The analysis of the Suffolk branches here may be questionable, since the official-managerial force there has rarely exceeded five in number, and *Castaneda* indicated that the standard deviation analysis was valid only for large samples. *Id.* at 496-97 n.17.[34] Even if the Suffolk data is unreliable, however, the analysis of the Portsmouth branches (which have consistently employed between 23 and 37 officials and managers) still negates an inference of racial discrimination in that job category. The number of standard deviations as to Portsmouth official-managerial personnel always remained less than two throughout the period in question.

The Court's final use of standard deviation analysis as to defendant's work force concerns office and clerical personnel (which, in both the Suffolk and Portsmouth branches, have constituted over two-thirds of defendant's work force). Using the percentage of qualified and available blacks in the communities comprising the relevant labor market area, the following are the differences between the expected and actual numbers of black office and clerical personnel:

[34] The Supreme Court has not specified the minimum number of hirees or work force that may be used in the standard deviation analysis. The lowest number used by the Supreme Court was 123, in *Hazelwood*. *Id.* at 311 n.17.

NUMBER OF STANDARD DEVIATIONS
Office and Clerical Employees

	Suffolk Branches		Portsmouth Branches	
	Suffolk (10.3%)	Nansemond (22.5%)	Portsmouth (21.5%)	Norfolk-Portsmouth SMSA (13.9%)
1968	1-2	2-3	4-5	3-4
1969	1-2	2-3	5-6	4-5
1970	0-1	1-2	4-5	3-4
1971	0-1	1-2	4-5	2-3
1972	0-1	1-2	4-5	2-3
1973	0-1	1-2	4-5	2-3
1974	1-2	2-3	4-5	2-3
1975	1-2	1-2	3-4	1-2

The statistics rebut the EEOC's proof as to the Suffolk branches. With the exception of 1969 and 1974, when the expected number of black office and clerical workers (using office and clerical employee statistics for Nansemond County) was two or three standard deviations from the "observed number," the number of standard deviatons as to office and clerical workers has remained less than two.

While the statistics for Portsmouth do not rebut the EEOC's proof of a pattern or practice as to office and clerical personnel in those branches, they certainly raise doubts about the Government's allegations. Concededly, when the office and clerical statistics for the City of Portsmouth are applied, the expected number of black office and clerical employees was consistently more than three standard deviations from the "observed" number in each year from 1969 to 1975. But when one uses statistics for the Norfolk-Portsmouth SMSA -- which contains six times the number of office and clerical employees in the City of Portsmouth[9] -- the picture becomes more ambiguous.

[9] See Stip. Ex. #46-51 (City of Portsmouth has 6,823 office and clerical workers; Norfolk-Portsmouth SMSA has 40,398). Also, the percentage of blacks in the office and clerical force is lower in the Norfolk-Portsmouth SMSA than in the City of Portsmouth -- 13.9 percent as opposed to 21.5 percent.

In that area, the number of standard deviations was greater than three only in 1969 and in 1970. Thereafter, until 1975, the number remained between two and three -- raising, at best, a slight suspicion of discrimination. When all of the various work force statistics are considered, however, the Court finds that the *Castaneda-Hazelwood* analysis lends no support to the allegations of discrimination.

2. *Hiring Statistics*

Defendant has attempted to apply the *Castaneda-Hazelwood* method to statistics concerning the persons it hired between 1969 and 1975. In a case alleging discrimination in hiring, hiring statistics are not only proper, but preferable, rebuttal evidence. See *Hazelwood School District* v. *United States*, *supra*, at 309; *International Brotherhood of Teamsters* v. *United States*, *supra*, at 360; *Croker* v. *Boeing Co. (Vertol Division)*, 437 F. Supp. 1138, 1183 (E.D. Pa. 1977).

Because the number of hiring decisions in the Suffolk branches was rather limited (39, or an average of 5.5 per year, between 1969 and 1975), the Court will apply the *Castaneda-Hazelwood* analysis only to the total number of decisions made between 1969 and 1975 in Suffolk, and will not analyze decisions year by year. Thus, from 1969 to 1975 the number of expected black hirees (12 for the City of Suffolk, 19 for Nansemond County) in the total hiree force of the Suffolk branches differed from the number of observed black hirees (7) by one to two standard deviations in the City of Suffolk and by three to four standard deviations in Nansemond County. The difference of more than three deviations in the more populous Nansemond County[36] at first glance supports the EEOC's case.

Again, however, an analysis of the hiring practices of Suffolk would be incomplete without an examination of hiring in the two

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[36] Nansemond County contained more than 12,000 employees during the period in controversy, while the City of Suffolk had slightly more than 4,000. Stip. Ex. #46-51.

job classificatons in which most of the Suffolk workers are included and in which blacks are allegedly underrepresented. Analysis of the official-managerial category would be of no value here, for the Suffolk branches hired only two individuals[37] in this category from 1969 to 1975. The Court finds that the 35 remaining personnel should be included in the "office and clerical" category. Between the expected number of black office and clerical hirees (4 in the City of Suffolk, 8 in Nansemond County) and the actual number (5)[38] there is a difference of less than two standard deviations for Nansemond County; if statistics for the City of Suffolk are used, there is no deviation."

Analysis of the Portsmouth branches' hiring is necessarily more limited, since total hiring figures are available only for the years 1973, 1974, and 1975. (Stip. Ex. E43). Moreover, there is no available evidence which would enable the Court to subdivide the gross hiring figures for 1973 and 1974 by job classification. Nonetheless, the hiring statistics for 1973, 1974, and 1975 cover three of the seven years in controversy and have relevance. The difference between the expected number and actual number of black hirees in the total work force was the following:

STANDARD DEVIATIONS

	Portsmouth (36.0%)	Portsmouth-Norfolk SMSA (25.1%)
1973	3-4	1-2
1974	3-4	1-2
1975	2-3	1-2
	5-6	2-3

[37] See Stip. Ex. #37, 42 (Wayland Pond and Ronald Williams, management trainees). Two individuals, both blacks, were hired as service workers. *(Id.)*

[38] The Court finds that, contrary to the EEOC's contentions, five black individuals were hired as office and clerical personnel by the Suffolk branches between 1969 and 1975. They were: B. Chambers (1969); C. Brockington (1971); J. Eaton (1972); G. Bethea (1974); and K. Estes (1975). (Stip. Ex. #37, 42).

If the figures for the City of Portsmouth (whose general work force is 36 percent black) are used, then a difference of more than three standard deviations existed in 1973 and 1974 -- and for all three years combined. But when the analysis instead is based upon figures for the Norfolk-Portsmouth SMSA -- which the Court considers more reliable because the SMSA includes five times the number of workers in Portsmouth[60] -- the difference was less than two standard deviations in each year and less than three standard deviations for the three years combined.

An analysis of the 1975 hiring figures for the Portsmouth branches -- the only figures from which it is possible, through the use of other exhibits, to subdivide by job category -- reinforces the Court's view that the standard deviation analysis of Portsmouth casts doubts upon the Government's proof. Of the 27 hirees that year, 2 were hired as management trainees, 2 as janitors, and 23 were employed in various clerical positions. (Stip. Ex. #37, 45). The number of management trainees (two) is simply inadequate for a meaningful standard deviation analysis. The expected number of black office and clerical hirees (5 using percentages for the City of Portsmouth, 3 using percentages for the Norfolk-Portsmouth SMSA) differs from the actual number (1) by slightly more than two standard deviations (2.1) in the City of Portsmouth and by fewer than two standard deviations for the more populous Norfolk-Portsmouth SMSA. According to *Castaneda* and *Hazelwood*, these figures do not render suspect defendant's hypothesis that hiring was not conducted without regard to race.

The statistical disparities presented by the EEOC created prima facie proof of discrimination. After considering the results of the applicant-flow analysis and the *Castaneda-Hazelwood*, however, the Court concludes that these analyses separately and together neutralize the EEOC's evidence. Therefore, the Court next will examine the hiring practices at issue.

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[59] The actual number of black office and clerical personnel hired (5) constituted 14.3% of the office and clerical force, exceeding the 10.5% minority office and clerical personnel figure for the City of Suffolk.

[60] See Stip. Ex. #46-51.

SCREENING AND HIRING PRACTICES

The EEOC contends that the screening, interviewing, and hiring practices of defendant violate Title VII. Specifically, the Commission alleges that between 1969 and 1975, defendant maintained the following unlawful practices: lack of objective, job-related standards; inconsistency of standards; preference for friends and relatives of employees; a word-of-mouth recruitment system; and an all-white interviewer staff. The Court will examine not only these practices, but also those other practices which the EEOC, before and at trial, suggested were discriminatory.

A. *Retail Credit Checks*

Until September 1975, defendant occasionally made retail credit checks on persons whom it had determined to employ. (Stip. Par. #31; Tr. 854). In its reasonable cause determination, the Commission concluded that the use of credit checks "has a foreseeably disproportionate impact upon Negroes as a class." (Stip. Ex. #16, pp. 4-5).[61] Neither at trial nor in its post-trial briefs, however, did the EEOC challenge this practice.

The Court finds that retail credit checks on persons selected for hire are facially neutral in their treatment of blacks and whites. EEOC presented absolutely no evidence in the record that the use of credit checks falls more harshly on blacks than on whites,[62] nor can discriminatory intent be inferred from the use of credit checks. The Court further finds that the use of credit checks by defendant served legitimate, important, and job related business purposes. Many of defendant's employees, particularly tellers, were exposed daily to a great deal of money. Although any employee in such circumstances might entertain occasional thoughts of stealing money, experience had taught defendant that individuals with credit problems found the temptation particularly difficult to

[61] The EEOC admitted that it had no evidence comparing the percentages of blacks and whites who had relatively poor credit ratings in the relevant labor market area. Nonetheless, the Commission found that the credit checks had a disparate impact on blacks because a disproportionate percentage of blacks in the United States are below the poverty level. (Stip. Ex. #16, p. 5).

resist. Moreover, customers would rapidly lose confidence in defendant if they knew that persons who lacked the ability to manage their own financial affairs were handling the money of others. (Tr. 855, 985). The use of credit checks, therefore, was not a violation of Title VII.

The High School Diploma Requirement

ntil May 1975, a high school diploma or its equivalent was inely required for employment by defendant as a matter of cy. The effect of this requirement on applicants is not known, ever. EEOC has identified no applicant who was rejected ause of the high school diploma requirement. (Stip. Par. 0). Nor has the Commission produced evidence showing that requirement had a disproportionate effect on blacks in the al, statewide, or national community.

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[62] As the Court has already noted, see note 16 *supra* and accompanying text, e post-trial briefs of the EEOC concede that this case is a "disparate eatment" case, not a "disparate impact" case. In a disparate impact case, a aintiff must show that a facially neutral job requirement or standard selects pplicants for hire in a significantly discriminatory pattern. Proof of iscriminatory motive is not required. Either theory, of course, may be applied o a particular set of facts. *International Brotherhood of Teamsters* v. *United States*, 31 U. S. 324, 335-36 n. 15 (1977). But statistics showing a racial imbalance n an employer's work force, which may be sufficient to prove the liscriminatory intent necessary under a disparate treatment theory, are usually inadequate by themselves in a disparate impact case. In the latter, the plaintiff must show that the particular requirement has operated to exclude a disproportionate number of blacks. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329-31 (1977) (sexual imbalance on work force attributable to height and weight requirements that exclude 41.13% of female population but only 1% of male); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 n.6 (1971) (racial imbalance attributable to educational requirements that operated to exclude 88% of black males in population (as opposed to 66% of white males) and to testing requirements that operated to exclude 94% of blacks, as opposed to 42% of whites); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978) (substantial underrepresentation of blacks in skilled trades and training programs attributable to educational requirement that operated to exclude 72% of black males in SMSA, as opposed to 51% of white males).

In "disparate impact" cases, courts have sometimes found that a high school diploma requirement operates to exclude disproportionate numbers of blacks and thereby violates Title VII. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976); *Dozier* v. *Chupka*, 395 F. Supp. 836 (S.D. Ohio 1975). But, as the EEOC concedes, this is not a "disparate impact" case; even if it were, the EEOC has not shown that the requirement of a high school education has a disparate impact.

The Court finds that the requirement of a high school education or its equivalent is facially neutral. Nothing in the record justifies an inference that this requirement is part of a pattern or practice of deliberate racial discrimination. The requirement, therefore, does not violate Title VII.

C. *Character and Employment References*

The application form used by defendant contained spaces in which applicants could list personal references. Prior employers were listed in the "Previous Employment Record" section of the application. As a matter of policy, when defendant was particularly interested in an applicant, it contacted the employers listed in the application. Less frequently, defendant also contacted the personal references listed. (Tr. 845, 855-56, 914-15). In its reasonable cause determination, the EEOC found that the character and employment references violated Title VII because: (1) defendant afforded applicants no opportunity to refute adverse references; and (2) "it is significantly more likely that [the reference] will have been influenced by racial discrimination than if the applicant were Caucasian." (Stip. Ex. #16, p.4).

The EEOC offered no evidence in support of these contentions. Rather, the only testimony concerning references refuted any notion that defendant used them as a means of eliminating blacks from consideration in hiring. There was also no evidence that the reference checks operated to exclude blacks. Defendant contacted

prior employers to verify data listed on the application and to obtain an evaluation of the applicant as an employee. (Tr. 856). The Court finds that this was a perfectly legitimate business practice based on defendant's reasonable belief that the past work performance of an employee is an indicator of future performance.

In addition, the Court finds that defendant gave character references little weight in the screening and hiring processes. (Tr. 845, 915). Because an applicant can be expected to list only those references who will give a favorable evaluation, requiring employers to allow rebuttal of adverse references would serve no useful purpose. The Court finds, therefore, that the use of credit and character references by defendant did not discriminate against black applicants.

D. *Testing*

From approximately 1964 until June 1, 1973, defendant administered to applicants the Wonderlic Personnel Test, the Number Series, the Name Finding and Number Perception Test. Shorthand and typing tests were administered for secretarial positions. With the exception of the shorthand and typing tests, all tests were discontinued on June 1, 1973. (Stip. Par. #29). The reasonable cause determination of the EEOC found that the use of these tests operated to exclude disproportionately large numbers of blacks from consideration in hiring. (Stip. Ex. #16, pp. 3-4).

At trial the EEOC offered no evidence indicating that these tests adversely affected blacks applying for jobs with defendant. The Court finds no basis for inferring discriminatory intent from the use of these tests. Thus, the use of the Wonderlic and other tests was a neutral practice and not a violation of Title VII.[43]

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[43] In cases involving the "disparate impact" theory, courts sometimes have found the use of Wonderlic and other tests in violation of Title VII. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). But, as noted *supra*, the EEOC characterizes this case only as one of "disparate treatment."

E. *Failure to Correspond with Applicants*

After it had completed the screening process, defendant contacted by letter or by telephone those whom it wished to interview. According to the EEOC, defendant failed to prove that it had conferred or corresponded with 44 of the 51 identified black applicants[64] following their application for employment. Many of the applicants who testified at trial stated that defendant had never contacted them after they applied. (*e.g.*, Tr. 368, 383, 391-92, 421-22, 437).

The Court finds that no inference of discrimination or discriminatory intent can be drawn from defendant's failure to contact applicants. As stated *supra*, defendant did not call in every individual whose application was in the "active file" for an interview. Normally, Portsmouth officials reviewed no more than 15 applications, and Suffolk officials contacted those individuals whose applications had been on file no longer than thirty days and had expressed interest in the particular position now vacant. (Tr. 216, 220, 981).

Even assuming *arguendo* that 44 of the 51 identified black applicants were never contacted,[65] the EEOC introduced no evidence concerning the numbers and percentages of white applicants whom defendant never contacted after they filed an application. That 90 percent of black applicants never heard from defendant would be disturbing absent the use of the screening process. But the very purpose of the screening process was the elimination from further consideration of individuals whom it would be pointless to interview. Many of the non-minority appicants who returned questionnaires to the EEOC complained that defendant had never contacted them (Stip. Ex. #23).

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[64] EEOC has identified 51 individuals in addition to the original charging party, Sandra Holland, as persons who were "unlawfully denied a job opportunity." (Stip. Par. #15, 18, 57).

[65] The accuracy of this allegation cannot be ascertained, since only 31 of the identified blacks testified at trial. Sandra Holland also testified, but the Court excluded her testimony as untimely. (Tr. 1063-64).

Because there is no evidence even suggesting that defendant contacted whites for interviews more frequently than blacks, the Court finds that defendant's failure to contact 44 black applicants creates no inference of discriminatory intent and does not constitute a Title VII violation.

F. *College Education as a Negative Factor*

Throughout most of the period in controversy (1969-1975), the defendant required as a matter of policy that applicants possess a high school diploma or its equivalent. The EEOC has identified no applicant who was rejected because he or she failed to meet this requirement. (Stip. Par. #30).

Although a high school degree was a requirement, post-high school education was not necessarily an advantage. Defendant did consider educational background more important than work experience when an applicant sought a managerial position. (Tr. 948-49). But for those applicants who sought non-managerial positions (which usually constituted 80 percent of defendant's work force), a college background was a handicap. Those with some college education, but not a degree, might be considered if their applications indicated that they were willing to accept the salary paid for the particular vacant position. College graduates, however, rarely survived the screening process. (Tr. 73, 206, 234, 250-51, 995, 1004, 1009).

Defendant's policy is reflected in its hiree force for the Suffolk branches between 1969 and 1975 and for the Portsmouth branches in 1975. Of the 65 hirees whose applications were submitted to the Court, 37, or 56.9 percent, had no college background.[66] Of the remaining 28 hirees (43.1 percent of the total) who had received some college education, 10 had

[66] The Court did not consider as a "college" local, commercially-operated "business schools" or "business colleges" which offer courses in typing, accounting, and other skills helpful to office and clerical personnel. Although the education offered by such schools may prove beneficial to customers, the discussions of "college" and "college educations" at trial clearly referred to accredited, bona fide colleges and universities.

baccalaureate degrees; eight of those ten were hired for managerial positions. The majority of the remaining 18 had attended college for two years or less.(Stip. Ex. #37). Less than one-quarter of the 28 white hirees who, according to the EEOC, were discriminatorily preferred for hire over the 52 identified black applicants had any college background. None of those white hirees had received a college degree at the time of their hiring. (Stip. Ex. #37, 88).

During direct examination and cross-examination of bank officials, counsel for the EEOC appeared to suggest that defendant's aversion to applicants with a college background reflected a discriminatory animus or operated to exclude substantially greater numbers and percentages of black applicants. The Court has reviewed the applications of the 52 identified black applicants and finds that 40 (76.9 percent) had received some college education at the time they filed an application. (Stip. Ex. #37, 88).[67] Twelve of these had baccalaureates. (Stip. Ex. #89-285). The issue is whether defendant's policy discriminated against black applicants in violation of Title VII.

According to the officials of defendant who testified at trial, their usual practice of rejecting individuals with college degrees, and their reluctance to interview or hire individuals without a degree but with some college background, was based upon their convictions and experience that such persons were "overqualified" for low-paying office and clerical (and janitorial) positions. Hirees with college backgrounds, they stated, quickly would become dissatisfied with the low salary and search for new employment. As two officials stated:

> Why would they go to college for four years and spend all that money and time to get a degree to be a runner and make a minimum wage?

[67] Of the 32 black applicants (including Sandra Holland, whose testimony the Court ruled inadmissible) who testified at trial, 28 (87.5 percent) had received some college education. (Stip. Ex. #37, 88).

> They would become dissatisfied. They would, you know, be continuously seeking for work in line with what they were trained for in college, and they're not going to stay with you.
>
> • • •
>
> Another thing we have a problem with is college graduates, someone who has taught, in a profession, coming in an entry-level position in a bank. It's very demeaningful [sic] to the person. It's not a challenging type position for a college graduate.

(Tr. 206-07, 995). While these statements concerned only college graduates, officials also feared that anyone with some college education was "overqualified." (Tr. 234, 1004, 1009).

Explanations that black individuals were rejected for positions because they were "overqualified" often are a pretext used to discriminate against minorities. *E.g.*, *Fisher* v. *Proctor & Gamble Manufacturing Co.*, 14 EPD ¶ 5265 (N. D. Tex. 1977); *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87 (E. D. Mich. 1973), *rev'd on other grounds*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U. S. 951 (1977). But courts have recognized that a bona fide, neutral policy of refusing to hire "overqualified" individuals does not violate Title VII. Experience often shows employers that a person who has received more education than is required for a particular job quickly becomes bored and dissatisfied with that job. See, *e.g.*, *High* v. *Sabena Belgian World Airlines*, 15 FEP Cases 131, 133 (E.D. N.Y. 1976); *Robinson* v. *Union Carbide Corp., Material Systems Division*, 389 F. Supp. 731, 741 (S. D. Ala. 1974), *modified on other grounds*, 538 F.2d 652 (5th Cir. 1976) and 544 F.2d 1258 (5th Cir. 1977), *cert. denied*, 434 U. S. 822 (1977).

On the basis of the testimony of the bank officials, the Court finds that defendant's policies as to applicants with college education had a legitimate business purpose and was not a pretext serving a discriminatory purpose. The Court is satisfied that

defendant considered college background as a negative factor solely because experience had shown that such persons would be unhappy, temporary employees. The fact that defendant required only a high-school education for entry into its non-managerial work force is evidence that defendant's policy was not a pretext for discrimination. Furthermore, the Commission introduced no evidence showing that black applicants with college education were rejected in proportions greater than similarly-educated white applicants.[66] Compare *Smith* v. *Union Oil Co. of California*, 17 EPD ¶ 8411, at 6144-47 (N. D. Cal. 1977). Defendant's policy was motivated solely by a desire to achieve a stable and harmonious work force. It was not an instrument of discrimination.

G. *The Alleged Preference for Friends and Relatives and Word-of-Mouth Recruiting*

As already stated in the discussion of the application process, *supra*, defendant requested applicants to list any relatives working for defendant. This question appeared on the first page of the application form; on a separate page, defendant asked the applicant to list several personal references.

According to the EEOC, 42 percent of the 74 white applicants whom defendant hired in Suffolk between 1969 and 1975 and in Portsmouth during 1975 named at least one friend or relative working for defendant. (Pl. Ex. #66). The Commission argues that these figures suggest a repeated and routine practice by defendant of relying almost exclusively upon the recommendations of employee-friends and employee-relatives in hiring. Because minorities were underrepresented in the work force, this alleged practice is said to violate Title VII.

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[66] Of the 10 blacks who were hired in Suffolk between 1969 and 1975 and in Portsmouth during 1975, 5 had some college education. (Stip. Ex. #37, 42, 45). Thus, 50 percent of black hirees had a college background, as opposed to 42 percent of those 55 white hirees whose applications were furnished to the Court. (*Id.*)

In addition, the EEOC contends that during the period in controversy defendant relied almost exclusively upon word-of-mouth recruitment in violation of Title VII. The argument supporting this position is basically the following. Until 1976, defendant failed to post notices to its employees of job vacancies. (Tr. 52-53, 55-57). Defendant never advertised a vacancy unless and until it had exhausted the applications on file and found them wanting (Tr. 57). These practices, plus defendant's alleged preference for friends and relatives of employees, constituted word-of-mouth recruitment. Since most of the employees were white, blacks would rarely (if ever) hear of a vacancy. Thus, underrepresentation of minorities was perpetuated in violation of Title VII.

An employee referral system for hiring violates Title VII, where the employer relies primarily or exclusively on it, because it tends to perpetuate the all-white or virually all-white composition of a work force. *E.g.*, *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 264 (10th Cir. 1975); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 411 U. S. 939 (1973); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U. S. 982 (1972). Word-of-mouth recruiting is also discriminatory when it tends to perpetuate minority underrepresentation in a work force. See, *e.g.*, *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975); *Rock* v. *Norfolk & Western Ry.*, 473 F.2d 1344 (4th Cir. 1973). Even hiring of walk-in applicants has been held to be racially discriminatory where most of the applicants learned of vacancies through word-of-mouth inquiry from employees on an all-white work force with a notorious history of discrimination, and where the employer showed partiality to applicants with friends and relatives in the work force. *Morrow* v. *Crisler*, 4 EPD ¶ 7563 (S. D. Miss. 1971), *aff'd*, 479 F.2d 960 (5th Cir. 1973), *cert. denied*, 419 U. S. 895 (1974).

It is true that in 1968, just before the period in controversy, defendant's work force was overwhelmingly white. Blacks

comprised only 6.3 percent of the total force. Defendant employed no black officials or managers, and only one black office and clerical worker. The remaining black employees were employed as service workers. (Stip. Ex. #54-87). If defendant in fact had displayed favoritism or partiality to friends and relatives of employees, or recruited primarily through word-of-mouth, it would have violated Title VII. The evidence, however, is to the contrary.

1. *The Listing of Friends and Relatives*

There was no dispute at trial that the listing of friends and relatives working for defendant was one factor taken into account during the hiring process. Defendant used the listed friend or relative as an additional reference source. Officials admitted that an applicant might improve his prospects of obtaining a position by listing friends and relatives. But the effect of listing a friend or relative was not necessarily positive. If defendant had a high opinion of the friend or relative, a favorable opinion of the applicant by that person would work to the applicant's advantage. However, a favorable opinion of the applicant by a poorly-regarded employee had little or no positive effect; indeed, the chances of the applicant might be reduced on the basis of a "birds-of-a-feather" theory. If any employee gave an adverse recommendation, the likelihood of hiring the applicant would decrease. (Tr. 224-25, 840, 896-98, 922, 982-83). There was another way by which the listing of a friend or relative could act as a double-edged sword; generally, defendant refused to hire relatives of employees. (Tr. 224).[60]

The Court cannot find from these facts that favoritism and partiality have been shown to friends and acquaintances of employees. The Court has already determined, in the discussion of

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[60] In reviewing the testimony and the applications of hirees, the Court noted only two hirees who had relatives working for defendant: Kurt Neumann, a short-term employee whose mother worked for the bank; and Shirley Woodland, whose mother-in-law was an employee. (Stip. Ex. #158; Tr. 119).

defendant's application process, that in screening and hiring applicants defendant examined a number of factors. Listing a friend or relative was one of them, but by far the two most important factors were past education and work experience.

Although it had access to the applications, EEOC never attempted to compare the percentage of applicants who listed friends or relatives with the percentage of hirees who did so. Thus, the fact that 43.2 percent of hirees had friends or relatives working for defendant[70] does not in itself show the existence of preference or favoritism toward those who listed friends or relatives on their applications. If anything, the EEOC's statistics show that the listing of friends and relatives was a minor factor; a majority of the hirees had no "contacts" working for defendant.

Other available evidence also contradicts the notion that there was a regular, routine preference for the friends and relatives of employees. Of the ten blacks known to have been hired by defendant (7 in Suffolk, 3 in Portsmouth), eight listed no friends or relatives on their applications.[71] Surely, had there been favoritism and partiality toward friends and relatives of employees, only the two blacks with "contacts" would have obtained jobs. Furthermore, the percentage of blacks on defendant's work force grew from 6.3 percent in 1968 to 10.0 percent in 1975. The percentage of black office and clerical workers grew from .83 percent in 1968 to 7.9 percent in 1975. If the reliance on friends or relatives had been as real as EEOC suggests, the percentage of blacks in these categories would have remained relatively constant. It did not.

The EEOC appears to take the position that, even if an employer does not rely primarily on the recommendations of

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[70] Pl. Ex. #66. The Court reviewed the 65 applications of hirees in Stip. Ex. #37 and found that 32, or 49.2 percent, listed friends or relatives.

[71] Stip. Ex. #37, 42, 45. The two black hirees who listed friends were service workers in Portsmouth. The other eight consisted of one office and clerical employee in Portsmouth, and two janitorial and five office and clerical employees in Suffolk. *Id.*

friends and relatives of applicants in hiring, the mere act of asking applicants to list friends and relatives working at the employer's establishment violates Title VII when minorities are underrepresented on the work force. The EEOC cites only one case, *Morrow* v. *Crisler*, *supra*, in support of this contention. But *Morrow* did not hold that an employer violates Title VII simply by asking or requiring applicants to list relatives or friends. In *Morrow*, the employer had shown obvious favoritism and partiality to applicants with friends and relatives on an all-white work force. In fact, nearly all hirees had listed firends or relatives on their applications. Furthermore, most of the hirees had learned of vacancies through word-of-mouth inquiry from these friends and relatives. Such circumstances, plus the employer's efforts to recruit only whites and to discourage blacks from hiring, rendered the listing of friends and relatives intolerable because it would have perpetuated past discrimination. 4 EPD ¶ 7563, at 5238-41.

The facts of the present action are totally different from those of *Morrow*. Defendant hires employees almost exclusively from the pool of walk-in applicants. The EEOC has not shown that defendant places primary or exclusive reliance on the recommendations of friends and employees. Instead, the evidence shows that whether an applicant knows or is related to an employee is a minor factor in the hiring process, that listing a friend or relative is not necessarily helpful to an applicant, and that whatever advantage results from the listing of a friend or relative is negligible in comparison to the importance of education and work experience. In such circumstances, the practice of asking applicants to list friends or relatives does not violate Title VII.

2. *The Alleged Word-of-Mouth Recruitment*

Alternatively, the EEOC asserts that defendant utilized a word-of-mouth recruitment system in violation of Title VII. The EEOC bore the burden of proving that such a system existed. The Court finds that the Commission has not met its burden.

Evidence of word-of-mouth references at trial was sparse. Two employees were relatives of employees at the bank and apparently

had heard of vacancies through them. Another two employees who were hired as messengers had been recommended by incumbent messengers. (Tr. 117, 119, 122; Stip. Ex. #158).

The remaining evidence, however, concerned word-of-mouth references that sought to encourage hiring of minorities. Several unsuccessful black applicants testified that they had learned of vacancies directly or indirectly through bank employees. (Tr. 423, 553-M, 615-16). At least since 1970, defendant has attempted to attract and hire qualified minority individuals through a variety of recruiting efforts: contacting placement and other officials at predominantly black educational institutions; encouraging black employees and customers to refer black applicants; furnishing on-the-job training for economically disadvantaged persons; and participating in the WIN program and "career days." (Def. Ex. #5-8, 10, 15-17, 19-22, 24, 28-30; Tr. 856, 899, 912-19, 967-77). Defendant also promulgated an affirmative action plan which, the Treasury Department found in September 1973, was in compliance with Executive Order 11246. (Pl. Ex. #74; Def. Ex. #2-5; Tr. 689-719).

Thus, most of the word-of-mouth recruitment to which witnesses referred at trial was designed to increase hiring of minorities, not to perpetuate the underrepresentation of blacks in the work force. Nonetheless, the EEOC insists that defendant relied almost exclusively on unlawful word-of-mouth recruiting because defendant allegedly: (1) preferred friends and relatives of employees; (2) did not advertise existing vacancies until after it had exhausted applications on file; and (3) failed to post notices of job vacancies to its employees.

The Court finds no merit in these arguments. First, the EEOC has not shown that defendant displayed favoritism or partiality toward the friends or relatives. Second, the evidence shows that through its recruiting efforts, defendant did attempt to "advertise" itself to qualified minorities outside its work force. That defendant screened applications before advertising when a particular position becomes vacant is not a violation of Title VII

unless it can be shown that the screening process is tainted with discriminatory intent or operates (through word-of-mouth recruitment or preference for friends or relatives of employees, for example) to perpetuate minority representation. EEOC has not so shown.

Third, contrary to the assertions of EEOC, the failure of an employer to post notices of job vacancies in a work force where minorities are underrepresented is not a *per se* violation of Title VII. It is true that the absence of job postings may be evidence of discrimination. *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1351 (4th Cir. 1976); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U. S. 982 (1972). But in Title VII cases, the failure to job-post must be examined in the totality of the circumstances. In *Brown, supra*, the employer passed along news of vacancies in higher-level positions solely by word-of-mouth and job classifications were almost completely segregated by race. Black workers rarely heard of vacancies in higher-level, all-white classifications before the position was filled, and the segregation continued. 457 F.2d at 1383. *Roman*, on the other hand, refused to draw an adverse inference from the failure to post notices of job vacancies where the statistical evidence showed no racial imbalance in promotions. 550 F.2d at 1351.

The Court finds that the failure of defendant to post notices of vacancies raises no adverse inference. Statistical evidence is, at best, inconclusive. With very few exceptions (transferees, for example), defendant hired employees from the available applicant pool. The evidence simply does not show that word-of-mouth was the primary or exclusive hiring technique of defendant.

Consequently, the Court cannot find on the basis of the evidence that job vacancies actually were filled through a racially discriminatory word-of-mouth system. The mere fact that applicants were required to list friends and relatives does not mean that defendant primarily relied on recommendations from these "contacts" in hiring. As the Court has already found, defendant did not display such favoritism. The few instances in which white

hirees learned of vacancies through word-of-mouth does not support the allegation that a widespread, established word-of-mouth referral system existed. The EEOC was required to show that hiring was conducted primarily through a word-of-mouth system. That showing has not been made.

H. *The Allegedly Subjective Standards*

The criteria and standards that defendant used in the hiring process were unwritten. Moreover, there were no written job descriptions during the period in controversy. EEOC argues, therefore, that no uniform standards existed and that defendant relied heavily on subjective criteria, in violation of Title VII.

Nonobjective hiring standards are always suspect because of their capacity for masking racial bias. See, *e.g.*, *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U. S. 982 (1972). But subjective standards are not *per se* violative of Title VII, for many hiring decisions cannot realistically be made on the basis of objective standards alone. *E.g.*, *Abrams* v. *Johnson*, 534 F.2d 1226 (6th Cir. 1976); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *vacated on other grounds*, 423 U. S. 809 (1975); *Rogillio* v. *Diamond Shamrock Chemical Co.*, 446 F. Supp. 423 (S.D. Tex. 1977); *Dozier* v. *Chupka*, 395 F. Supp. 836 (S.D. Ohio 1975). Thus, the absence of objective guidelines does not necessarily prove that discrimination exists, although it may be considered evidence thereof in proper cases. *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1354 (4th Cir. 1976).

The Court simply cannot agree with the Commission that defendant made "high use" of subjective standards throughout the hiring process. During the screening process, officials considered nine factors: education, prior work experience, salary desired, position desired, the address of the applicant, the listing of friends and relatives, the neatness and correctness of the application, past bonding or inability to be bonded, and willingness to work full-time or part-time. All of these factors were objective (with the possible exception of neatness and the listing of friends and

relatives, the significance of which was governed primarily by the reviewing official's evaluation of the individuals listed). As even the EEOC apparently admits, education and work experience were by far the most important factors. (Stip. Par. #24). Bank officials in charge of hiring rarely were present when applicants filled out application forms. An applicant's race was not listed on the application, and could not be determined merely by examining the responses written on the application.

The Court finds, therefore, that objective standards were used during the screening process and that officials took the same standards into account after interviewing an applicant in determining whether the interviewee should be hired. The EEOC complains, however, that these standards should have been incorporated into written guidelines for officials involved in the hiring process. This argument is without merit here, for several reasons. First, such cases as *Brown* and *Roman*, *supra*, did not require written standards; all they required was that the standards generally be objective and uniform. See, *e.g.*, *McAdory* v. *Scientific Research Instruments, Inc.*, 355 F. Supp. 468, 475 (D. Md. 1973). Here bank officials constantly and consistently testified that the aforementioned factors (especially education and work experience) governed their decisions in the screening process and played an important role in the ultimate hiring decision. Neither statistical nor other evidence furnished by the EEOC was sufficient to show that this testimony was false.

Second, even if written standards are required, the application form itself served as a written guide to bank officials. The questions asked on the form notified not only applicants, but also officials, what defendant considered relevant and important factors in hiring. Questions concerning prior educational and work history, which were the two most important factors, required the most detail. Most, if not all, of the questions on the form requested applicants to supply information concerning the aforementioned factors (with the exception of the desire to work full-time or part-time, which the applicant normally described to

a designee of defendant). Consequently, it would have been superfluous for defendant to formulate written guidelines.

It is true that such "objective" terms as "past education" and "work experience" are vague, and may be defined differently by officials. Yet *Brown* and its progeny do not require highly particularized definitions. Rather, only general objective guidelines are required as long as they are applied uniformly.[12] The EEOC has not shown that the standards were applied inconsistently.[13] For example, contrary to the assertions of the EEOC, the Court finds no inconsistency in the attitudes of bank officials, Juanita Cutchin and Wayland Pond, toward applicants with college degrees. Both testified that they usually did not hire college graduates for the low-paying teller jobs, although they might consider applicants who had received some college education but not a degree. Both preferred applicants with no college education. (Tr. 949, 995, 1009).

In any event, the Court finds that the aforementioned objective standards were sufficiently specific. Defendant, as a matter of policy, required employees to have a high school degree or its equivalency. The application requested applicants to designate what machines (commonly used in banks) they could operate and what office and clerical skills they possessed. While there was no formal written definition of work experience, bank officials consistently sought applicants with prior banking experience or, in the alternative experience in dealing with cash and customers. Most of the remaining factors were simple, "either-or" matters:

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[12] That uniformity, and not detail, is the essential requirement is illustrated by *United States* v. *Local 357 of International Brotherhood of Electrical Workers*, 356 F. Supp. 104 (D. Nev. 1973), where a union promulgated highly detailed definitions of "education" and "experience" but nonetheless was held to have violated Title VII because it did not apply them uniformly to whites and blacks.

[13] As the Court will describe *infra*, there were particular reasons why each of the identified black applicants was rejected. The reasons varied from applicant to applicant. Thus, the Court will defer its discussion of those cases where defendant allegedly applied inconsistent standards (Lena Walltower and Maronne Hoggard Moore) to the applicant-by-applicant discussion.

an applicant did or did not wish to work part-time, had or had not been bonded, asked or did not ask for a salary higher than that normally paid for the particular position, and so forth. Thus, officials did not have the absolute, unbridled discretion condemned by such cases as *Brown* and *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

EEOC also argues that defendant was obligated to maintain written job descriptions. The Court disagrees. Bank employees described the types of positions that were open to applicants. (Tr. 200). Bank officials had extensive experience in banking work and knew what qualifications an applicant must possess to perform satisfactorily in a particular position. (Tr. 283-84). For these reasons, maintenance of written job descriptions was unnecessary.[74]

Next, EEOC attacks the consideration and evaluation of physical attractiveness, neatness, maturity, personality, and ability to communicate during the interviews of applicants. The Commission particularly attacks defendant's failure to compile written, uniform standards to guide interviewers in selecting physically attractive applicants. However, the Court finds that the use of such subjective standards did not violate Title VII.

Defendant admits that it assesses the physical attractiveness and neatness of applicants, especially when the particular vacant position is a "contact" position -- *i.e.*, positions requiring frequent contact with customers. In filling contact positions, defendant seeks young, attractive women. (Tr. 270) Officials testified that they determine attractiveness and neatness simply "by looking." (Tr. 226, 906-11).

[74] The Commission also complains that there were no written standards to assess the performance of applicants who were in defendant's teller training program. This argument is without merit. Bank officials, on the basis of previous experience, knew what qualities and qualifications a "good" teller must possess, and compared them to the performance of trainees. (Tr. 1013-16). Furthermore, it is difficult to imagine how totally objective standards (other than the amounts of money a teller loses while working) as to a teller's performance could be compiled.

Officials considered attractiveness and neatness important factors because the presence of such qualities in employees in contact positions promoted the good image of defendant, enabling it to compete with other banks. (Tr. 228, 849). The public expects to see attractive and neat persons in "contact" positions. (Tr. 925-26). The Court finds that the consideration of attractiveness and neatness serves legitimate and important business considerations. In any competitive industry, a business needs to put its "best foot forward" to survive. Where, as here, the operation of a business involves frequent direct contacts with customers, the perception of the customers is important. The attractiveness and neatness of a contact employee are seen -- and evaluated -- immediately by the customer. It is certainly reasonable to assume that, because of human nature, and in the absence of other factors, customers will find a business more attractive if the contact employees of the business are physically attractive and neat. Conversely, unattractive and sloppy employees will decrease the appeal of the business.

EEOC argues that defendant was obligated to promulgate written uniform standards to guide an interviewer in selecting a physically attractive applicant. This argument is without merit. Experience tells us that attractiveness and neatness are virtually impossible to objectify. Beauty is, after all, in the eye of the beholder. Whether an individual is particularly attractive or neat can be a subject of considerable disagreement among perfectly reasonable people.

Whatever the undefined and unascertainable qualities constituting attractiveness and neatness may be, however, clearly bank officials did not find them only in whites. Officials testified that they found many black applicants physically attractive and neat. (Tr. 270, 907, 922-24). Interviewers recorded on some applications that they found the black interviewees attractive and neat. (Stip. Ex. #207, 235). Moreover, it appears that at least five black individuals were hired for teller positions during the period in controversy.

The Court also finds that the evaluation and consideration of maturity, personality, and ability to communicate in the hiring process by defendant were not violative of Title VII. Like attractiveness and neatness, these qualities are impossible to objectify. Yet, hiring individuals who are mature, congenial, and articulate serves an important business interest of defendant. Many bank employees deal directly and frequently with the public. To attract and retain customers, employees must appear friendly, open, mature, and articulate. (Tr. 66, 848, 911, 925-26). These considerations reflect a harsh fact of business life: that perception, not reality, is important. Although contact employees rarely have a voice in bank policy or decisions, they are the employees with whom customers usually deal. The brilliance and competency of bank management are meaningless unless the bank's public relations are satisfactory. Maintenance of customer confidence is essential for banks, which (unlike most businesses) do not make individual sales but instead safeguard and invest the money of customers over a continuous period. Tellers who appear rude or incompetent will drive customers away.

EEOC did not prove that evaluations of maturity, personality, and ability to communicate caused discrimination against black applicants. Blacks were hired for contact positions, and interviewers noted that some black applicants were mature, personable, or articulate. (Stip. Ex. #150, 207). Consideration of these subjective qualities, like consideration of attractiveness and neatness, was necessary to maintain defendant's competitive position.

1. *The All-White Interviewer Staff*

All of the officials of defendant who were somehow involved in the hiring process were white. Few had experience, and none had formal training, in interviewing and hiring before working for defendant. EEOC does not contend that such an all-white interviewing staff is *per se* violative of Title VII. Nonetheless, the Commission asserts that where a defendant maintains an all-white

staff without maintaining uniform objective hiring standards, and blacks are underrepresented, discrimination should be inferred because these practices tend to perpetuate the underrepresentation.

It is true that blacks have been underrepresented on defendant's work force during the period in controversy. But the hiring statistics convince the Court that defendant did not discriminate in hiring against blacks during this period, for the reasons stated in the discussion of the statistical evidence, *supra*. The Court has also found that the defendant utilized and applied uniform objective standards (although unwritten), and that consideration and evaluation of the attractiveness, neatness, maturity, personality, and communicability of an interviewee were permissible. Hiring was not conducted through word of mouth, nor was bias displayed in favor of friends and relatives of employees. These circumstances are a stark contrast to the two cases relied upon by the Commission.[73]

The Court has found it necessary to examine separately each of the allegedly discriminatory hiring practices. However, even when these practices are considered in tandem, the Court finds

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[73] In *Reed* v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U. S. 854 (1973), the employer displayed obvious bias to blacks. At the time suit was filed, nearly half of the employer's departments were segregated by race, and employees who performed substantially the same duties were divided into segregated departments. Even in non-segregated departments, tasks were assigned according to race. Most recruiting was done by word of mouth, and individual department heads were responsible for recruiting. Thus, continuation of the status quo was inevitable.

Discrimination was even more flagrant in *United States* v. *Lee Way Motor Freight, Inc.*, 7 EPD ¶ 9066 (W. D. Okla. 1973). In that case, many blacks were told explicitly that blacks could not be considered for traditionally white jobs; virtually all mechanics hired were white, and black mechanics received lower wages than whites; black drivers were isolated; black applicants often were given false information concerning qualifications; all black applicants, but not all white applicants, were required to meet the qualifications; and the evaluations by the white staff were totally subjective.

that they are lawful under Title VII. The hiring practices and criteria are legitimate business ones, and the overall statistical evidence does not support an inference of disparate treatment.

THE SPECIFIC CLAIMS OF INDIVIDUAL DISCRIMINATION

In its proposed findings of fact and conclusions of law, EEOC stated that it wished to include as part of its evidence the specific instances of identified black applicants who were not hired by defendant.[75] Thirty-one of these applicants (excluding Sandra Holland, whose testimony was held inadmissible) testified at trial.

Specific instances of discrimination may be one prong of a pattern-or-practice attack. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 303 (1977). In *Hazelwood*, the Supreme Court did not question the holding of the Court of Appeals for the Eight Circuit that, when the government cites specific instances of alleged discrimination during its attempt to estblish a prima facie case, those instances should be measured against the four-part test of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). 433 U.S. at 305. *McDonnell Douglas* held that a prima facie case may be established by showing that: (a) an individual belongs to a racial minority; (b) he applied and was qualified for a

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[75] In July and August 1976, after reviewing applications and questionnaires, EEOC identified 51 applicants (in addition to Sandra Holland) who allegedly were victims of discrimination in hiring. (Stip. Par. #15-18).

The parties submitted to the Court only the applications of those hired by defendant in Portsmouth during 1975 and in Suffolk from 1969 to 1975, and the applications of the identified black applicants. Thus, it is not possible to reconstruct the situation in existence at the time defendant was filling a particular vacancy. In comparing the hirees to the identified black applicants, the Court has no way of knowing how many additional applications were on file at a particular time or whether any of these additional applicants possessed qualifications equal or superior to those of the identified black applicants.

job for which the employer was seeking applications; (c) despite his qualifications, he was rejected; and (d) after his rejection, the position remained open and the employer continued to seek applicants from persons of his qualifications. 411 U.S. at 802.[77] The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the individual's rejection. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577-78 (1978); *McDonnell Douglas Corp.* v. *Green*, *supra*, at 802. If the employer shows such a reason, a plaintiff must be given an opportunity to prove that the stated reason is in fact a pretext. *Furnco*, *supra*, at 578; *McDonnell Douglas*, *supra*, at 804.[78]

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[77] *McDonnell Douglas* cautioned, however, that this test is not necessarily applicable in every respect to differing factual situations, for facts vary in Title VII cases. 411 U. S. at 802 n. 13.

[78] In a pattern-or-practice case, the Commission need not show that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policies. Its burden is to establish a prima facie case that such a policy existed. *Teamsters* held that statistical evidence, either alone or in conjunction with evidence of hiring procedures, may be sufficient to constitute a prima facie case. If the employer fails to rebut the inference that arises from a prima facie case, a trial court may then conclude that a violation has occurred and conduct additional proceedings to determine the scope of individual relief. At the additional proceeding, the EEOC need only show that an individual discriminatee unsuccessfully applied for a job and was therefore a potential victim of discrimination. The burden then rests on the employer to demonstrate that the individual was denied a job for lawful reasons (for example, that the applicant was not qualified). *Teamsters*, *supra*, at 361-62. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 773 n. 32 (1976). Thus, if the EEOC chooses to present evidence of specific instances only after the liability stage, it need not prove two elements of the *McDonnell Douglas* test: that the applicant was qualified and that, after his rejection, the position remained open and the employer continued to seek applicants from persons of his qualifications.

A. Claimants Who Testified at Trial

1. *LaVerne J. Barks* (Stip. Par. #73)

Laverne Barks, a black female, applied in Portsmouth for a position on August 11, 1975. (Stip. Ex. #199). At the time she applied, she was a high school graduate and had attended college for approximately two years. Previously she had worked as a teller trainee for two months, a substitute teacher for four years, and a teacher's aide for four months. EEOC contends that the following persons were subsequently hired and discriminatorily preferred for hire over Ms. Barks: Nola Mater, a proof operator (Stip. Ex. #201); Mary Catlett, a teller (Stip. Ex. #202); Aaron Truitt, a mail clerk (Stip. Ex. #203); Hiram Brice, a runner who operated defendant's supply department (Stip. Ex. #204); Harvey Eure, Jr., a runner (Stip. Ex. #205); and Jeanette Emmett, a new accounts receptionist (Stip. Ex. #206).

The Court finds that Ms. Barks was qualified for these positions. However, on her application she admitted that she had been discharged from her position as a teller-trainee "because of company policy . . . the company felt that I could have been faster." The vice president of defendant in charge of personnel testified that defendant hires no applicants who have been discharged by another bank as a result of "company policy." Defendant rejects such applicants because it assumes that the employee was terminated because of unsatisfactory performance. (Tr. 167-70). The Court finds that this was a legitimate, nondiscriminatory reason for Ms. Barks' rejection. None of the aforementioned hirees stated on their applications that they had ever been discharged or asked to resign. Therefore, Ms. Barks was not discriminated against because of her race.

2. *Brenda C. Barnes (Stip. Par. #45)*

Brenda Barnes, a black female, applied twice in Portsmouth for a position with defendant -- on April 23, 1975, and July 30, 1975. (Stip. Ex. #92, 93). EEOC alleges that the persons

discriminatorily preferred over Ms. Barnes were Darwin Mills, a custodian (on her first application), and Nola Ann Mater, a proof operator (on her second application). (See Stip. Ex. #95, 96).

Ms. Barnes had two years of experience at a Suffolk bank and one year of experience as a cashier at the time she applied. She was a high school graduate. The Court finds that she was qualified for work as a custodian or as a proof operator.

However, the Court also finds that Ms. Barnes was not discriminated against because of her race when she applied on April 30, 1975. Darwin Mills, the person allegedly preferred for hire over her is black. (Tr. 105).

When Ms. Barnes applied for the second time on July 30, she was responding to a newspaper advertisement. (Tr. 495). Defendant apparently was quite impressed with her during an interview that was conducted. The interviewer wrote that she was "very pleasant, neat appearance, and has good working experience . . .Will consider." (Stip. Ex. #93). However, in a letter dated July 31, defendant notified her that it was unable to hire her because she and her husband had a poor credit history. (*Id.*) Ms. Barnes protested to defendant, but to no avail. (Tr. 497).

The Court finds that Ms. Barnes was rejected for a position in July 1975 solely because of her questionable credit rating. As stated earlier, defendant's use of credit checks[79] was a neutral practice that served a legitimate business purpose -- the need to avoid hiring persons who, because of a poor credit situation, may be particularly tempted to embezzle. The credit evaluation of Ms. Barnes shows that while most of the questionable credit transactions were in the name of her husband, some were in her name. And, although another bank had hired her despite this credit situation, defendant was still entitled to formulate its own hiring policies and practices.[80] There is no evidence that Nola Ann Mater had a bad or questionable credit rating at the time of her hiring. Consequently, Ms. Barnes was not discriminated against because of her race.

[79] It should be noted that defendant made credit checks only on persons whom it had determined to employ. (Stip. Par. #31)

3. *Clementine C. Bess* (Stip. Par. #53)

Clementine C. Bess, a black female, submitted an application for employment in Suffolk on March 13, 1972. She had been referred by a black minister who was assisting defendant in its affirmative action program. (Tr. 423). EEOC alleges that Nancy Ann Pierce, a white female, was discriminatorily preferred for hire over Ms. Bess.

In her application, Ms. Bess stated that she desired a job as a teller. She had a high school degree and had attended college for one year. She also had secretarial and clerical experience. Ms. Bess could operate some business machines and type. (Stip. Ex. #118). The Court finds that she was qualified for a teller's position.

Nancy Ann Pierce applied for employment as a teller on May 26, 1972. (Stip. Ex. #120). At the time she applied, she was completing her last year of high school. Ms. Pierce, who had worked as an office clerk, could type and operate some business machines. She was hired on June 14, 1972, as a part-time teller. (Stip. Ex. #88, 120).

The Court finds that Ms. Bess was not a victim of racial discrimination. Ms. Pierce submitted her application 74 days after Ms. Bess did so, and was hired 93 days after Ms. Bess applied. During the screening process, the Suffolk branches rarely reviewed applications filed more than thirty days before. In 1972, the office and clerical hirees at Suffolk obtained employment no more than 55 days after applying.[81] Consequently, the application of Ms. Bess was not reached for comparison with that of the person hired. (Tr. 230). Ms. Bess was not discriminated against because of her race.

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[80] Furthermore, it is unclear whether the bank for which Ms. Barnes worked was ever aware of her credit situation.

[81] Stip. Ex. #42. The periods between the date of application and the date of hiring were 5, 6, 19, 34, and 55 days for the five hirees. *Id.*

4. *Brenda Regina Blunt* (Stip. Par. #66)

Brenda Regina Blunt, a black female, applied in Portsmouth for a teller's position on August 28, 1975. (Stip. Ex. #159). The Commission alleges that two white persons were discriminatorily preferred for hire over Ms. Blunt: Harvey B. Eure and Aaron J. Truitt. (Stip. Ex. #161, 162).

Ms. Blunt had completed high school at the time of her application. She also had attended business school for several months and college for one year. Previously Ms. Blunt worked for one month as a presser and for five months as a checker at a shipyard. The Court finds that she was qualified to hold a teller's or other clerical position.

Messrs. Eure and Truitt were hired in September 1975 as messenger-runners. These employees haul "teller work" from branch to branch. The job is tedious and difficult for defendant to fill. (Tr. 120-22). Although Ms. Blunt denied that she had written "Teller" on her application in the space "position desired," the Court finds -- in view of defendant's requirement that its designee fill in unanswered spaces on the form after obtaining the necessary information from the applicant -- that she told the designee that she desired a teller position. Even at trial she testified that she wanted an inside clerical job. (Tr. 490-91). Neither Eure nor Truitt, in contrast, stated what positions they desired. They were referred by other runners (Tr. 120-22).

Since the environment and duties of a messenger differ so completely from those of a teller (or any "inside" clerical position), the application of Ms. Blunt would not have been considered for the two "runner" vacancies. (Tr. 198-200). Consequently, the Court finds that Ms. Blunt was not discriminated against because of her race.

5. *Peggy P. Boone* (Stip. Par. #54)

Peggy Boone, a black female, filed an application on August 16, 1974, in Suffolk. (Stip. Ex. #121). She desired a teller's position. EEOC alleges that Grace Louise Bangley, a white teller

who was hired on October 7, 1974, was discriminatorily preferred for hire over Ms. Boone.

The application of Ms. Boone stated that she was a high school graduate and had attended college for two years. Her work experience was the following: salesclerk for eight months; secretary for six months; and fourteen months as a processor. She stated that she could operate several business machines and type. She listed a friend employed by defendant. The Court finds that Ms. Boone was qualified to work as a teller.

Grace Louise Bangley applied for a job as a teller on September 24, 1974, 39 days after Ms. Boone filed her application (Stip. Ex. #123). A high school graduate, she was able to operate an adding machine and type. She had been a cashier at a food store for three years. Ms. Bangley listed two friends employed by defendant.

It is unclear whether the applications of Ms. Boone and Ms. Bangley actually were considered together. (Tr. 248, 931-32).[82] But even assuming *arguendo* that they were, the Court finds that defendant rejected Ms. Boone for legitimate, nondiscriminatory reasons. Ms. Bangley had worked for a longer period of time in a "contact" position involving the handling of cash -- experience that defendant considered "invaluable." (Tr. 931-32). In contrast, Ms. Boone was regarded as introverted by the interviewer. Although the bank witness admitted he was "at a disadvantage" in reconstructing the past events (Tr. 932), he felt sure that he would have preferred the experience of Ms. Bangley, if the two had in fact been compared. (Tr. 932-33).

The Court finds that Ms. Boone was not discriminated against because of her race.

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[82] It is unlikely that the application of Ms. Boone was screened. Although one of the first three tellers hired in 1974 obtained a position 46 days after filing an application, after June 1974, the remaining four tellers hired obtained their positions no more than 20 days after applying. (Stip. Ex. #37, 42).

6. *Homezelle Bernice Chambers* (Stip. Par. #78)

Homezelle Bernice Chambers, a black female, filed an application in Portsmouth on October 2, 1975. (Stip. Ex. #223). She desired full-time employment as a teller. (Tr. 553-F, 553-H). EEOC contends that Jeanette Y. Emmett, a white part-time new accounts receptionist, was discriminatorily preferred for hire over Ms. Chambers.

The application of Ms. Chambers stated that she was a college graduate with a degree in education. For eight years she had been a teacher at American military installations overseas at salaries ranging from $7,650 to $8,000 per year. She could operate adding machines, dictaphones, and calculators.

Jeanette Emmett, a white female, applied on September 25, 1975, for part-time employment as a secretary, clerk, or teller at "scale." She was hired on October 6. (Stip. Ex. #88, 225). A high school graduate with some business school education, she stated that she could type and operate adding machines and dictaphones. Ms. Emmett had worked as a transcriber for 20 years and as a secretary for 3 years. Like Ms. Chambers, Ms. Emmett listed a friend who worked for defendant.

The Court finds that, whether or not her application was actually reviewed or considered, Ms. Chambers was not discriminated against because of her race, for several reasons. First, she was not qualified for a position as a new accounts receptionist. That position requires the ability to type, and Ms. Chambers did not list typing as one of her special skills. (Stip. Ex. #223; Tr. 990-91). Second, the position was only part-time, and Ms. Chambers had stated that she desired full-time employment. (Tr. 203, 553-54, 990). Third, the salary which Ms. Chambers (a college graduate) had received in her previous job far exceeded the salary paid by defendant to a part-time new accounts receptionist, and defendant reasonably believed that such persons would be unhappy, temporary employees. (Tr. 206-07).

7. *Elaine V. Copeland* (Stip. Par. #55)

Elaine V. Copeland, a black female, applied for an office position in Suffolk. Her application is undated. (Stip. Ex. #124). EEOC contends that Linda Taylor Johnson, a white female, was discriminatorily preferred for hire as a teller over Ms. Copeland.

Ms. Copeland certainly was qualified for an office position. She had a college degree in office administration, could operate many business machines, typed, and took shorthand. Ms. Copeland had taken four summer jobs, working as a processor or as a clerk.

Linda Taylor Johnson applied for "any" position on June 25, 1974. She was hired on July 15 of that year. A high school graduate, she could type and operate several business machines. Her clerical experience was extensive, and she also had worked as a secretary.

Ms. Copeland testified that she had filed her application in May 1974 (Tr. 399). Other evidence, however, discredits this testimony. In the "work history record" portion of her application, Ms. Copeland stated that her latest job had terminated in September 1974. Furthermore, in describing her educational record on the application, she listed June 1974 as the date of her graduation. (Stip. Ex., #124). Having evaluated the demeanor of Ms. Copeland at trial and having examined her application, the Court finds as a fact that Ms. Copeland did not apply for a position at least until September 1974 -- two months after Ms. Johnson was hired. Thus, the application of Ms. Copeland was not even in existence at the time of Ms. Johnson's hiring.

For the reasons stated, the Court finds that Ms. Copeland was not discriminated against because of her race.

8. *Venita Rose Davis* (Stip. Par. #56)

Venita Rose Davis, a black female, applied in Suffolk on July 22, 1975, for employment as a typist or file clerk. (Stip. Ex. #127). The Commission argues that Ann P. Thomas, a white female, was discriminatorily preferred for hire as a part-time teller over Ms. Davis.

Ms. Davis was a high school graduate and had attended college, where she received a degree in "secretarial science." She could type, take shorthand, do accounting, and operate several business machines. Her work experience consisted of two summer jobs and part-time work (evidently for a professor) at college. The Court finds that she was qualified for work as a teller, typist, or file clerk.

Ann Thomas applied in Suffolk on August 22, 1975. She wrote on her application that she desired to be a part-time teller, and she was hired on the same date. Ms. Thomas began work on September 2. (Stip. Ex. #129). On the application she listed a former bank official as a friend who worked for defendant. She had worked at a department store for approximately five months and she had the ability to operate an adding machine and do credit work.

At trial, Ms. Davis testified that at the time she applied she wanted full-time work and was not applying for a part-time teller's job. (Tr. 648, 651-52). Moreover, on the application she specifically stated that she desired a position as a "typing/file clerk" -- positions with responsibilities considerably different from those of a teller. It is even unclear whether Suffolk officials reached or considered her one-month-old application for the position during the screening process. (Tr. 254-55).

The Court finds that Ms. Davis was denied a position for legitimate, nondiscriminatory reasons. Defendant usually hired only those applicants who had included the particular vacant position within their response to the "position desired" question on the application. When attempting to fill part-time positions, defendant selected for interviews applicants who had indicated a willingness to accept part-time work. At the time she applied, Ms. Davis expressed interest neither in a teller's position nor in part-time employment. Ms. Thomas, in contrast, specifically desired both.

Consequently, whether or not her application was reached and examined during the screening process, Ms. Davis was not discriminated against because of her race.

9. *Donna Marie Graham* (Stip. Par. #46)

Donna Marie Graham, a black female, filed an application in Portsmouth on August 7, 1975, seeking a position as a teller or clerk. (Stip. Ex. #97). EEOC alleges that Harvey B. Eure, Jr., a white male who was hired as a messenger-runner, was discriminatorily preferred for hire over Ms. Graham.

Ms. Graham had a college degree in English. She had worked as a cashier-dietary clerk for more than two years, and also worked as a processor in a summer job. The Court finds that Ms. Graham was qualified to fill the position of messenger-runner.

Mr. Eure applied in Suffolk on September 9, 1975, and was hired the same day. (Stip. Ex. #88). He did not respond to the "position desired" question on the application but listed two friends who worked for defendant. (Stip. Ex. #98). Mr. Eure was a high school graduate who had retired in 1974 after working for 35 years as a safety officer.

There was no evidence that the application of Ms. Graham was even reached or considered for Mr. Eure's runner-messenger position. (Tr. 987). She applied 33 days before the date of his application and hiring. Defendant's Portsmouth branches rarely reached applications more than thirty days old during the screening process; of the 21 individuals hired before Mr. Eure in Portsmouth in 1975, only three applied more than 26 days before they were hired. (Stip. Ex. #45).

Even if officials did reach and consider the application of Ms. Graham, however, the Court concludes that she was rejected for legitimate, non-discriminatory reasons. Messenger-runners carry "teller work" from branch to branch. The job is extremely boring. Defendant reasonably expected that college graduates would find the work unchallenging, become unhappy, and leave quickly. (Tr. 120-21). Furthermore, for these messenger-runner jobs defendant preferred to hire individuals who had retired from civil service or who had been in the work force for a long time. Unlike Ms. Graham, Mr. Eure met both requirements. (Tr. 120, 987).

Therefore, the Court finds that Ms. Graham was not discriminated against because of her race.

10. *Clarence E. Harper* (Stip. Par. #52)

Clarence E. Harper, a black male, applied in Portsmouth on October 21, 1975, for employment as a management trainee. (Stip. Ex. #115). EEOC alleges that Elizabeth Howell, a white female who was hired as a new accounts receptionist, was discriminatorily preferred for hire over him.

Mr. Harper is a college graduate with a degree in business adminstration. He operated several business machines and could do accounting, credit, and typing work. Since July 1975 he had been a credit interviewer. For four years, he was an assistant manager of a local bank in charge of all office and clerical personnel and the day-to-day operations of the bank. (Tr. 621). He also had worked as a forklift operator and mechanic.

Elizabeth Howell applied November 4, 1975, for employment as a secretary or receptionist. She was hired on November 6. (Stip. Ex. #117). Ms. Howell operated several business machines and could do shorthand and typing. For five years, she had worked as a secretary or new accounts receptionist at two banks.

Mr. Harper met the necessary qualifications for the new accounts position. However, the Court finds that he was rejected for legitimate, nondiscriminatory reasons. In his previous job as assistant manager of a bank, he had earned $11,000 each year. When he filed his application with defendant, he desired a management position that paid at least the same salary. (Tr. 622-23). Mr. Harper himself testified that he had no interest in Ms. Howell's position. (Tr. 623). Defendant would probably not have compared their applications because Mr. Harper expressly requested a management position while Ms. Howell expressly requested a job as a secretary-receptionist. (Tr. 127). Moreover, Mr. Harper was overqualified for a receptionist's position; he was a college graduate, and during his previous employment by a bank he had worked in an executive position at a salary that far exceeded the $480.00 per month paid to Ms. Howell.

Mr. Harper, therefore, was not discriminated against because of his race.

11. *Denise Harrell* (Stip. Par. #82)

Denise Harrell, a black female, applied in Portsmouth on May 12, 1975. (Stip. Ex. #235; Tr. 539, 549). EEOC complains that two individuals were discriminatorily preferred for hire over Ms. Harrell: Ann P. Thomas and Shirley F. Garrett, white females who were hired as tellers in Suffolk. (Stip. Ex. #42, 237, 238).

Ms. Harrell was qualified to hold a teller's position. She was a high school graduate, typed, and could operate several business machines. Her work experience included jobs as a thermofax operator at a bank and as a clerk trainee at a bridge authority. (Stip. Ex. #235).

For several reasons, however, the Court finds that Ms. Harrell was not discriminated against because of her race. First, Ms. Harrell never was considered for the positions held in Suffolk by Ms. Thomas and Ms. Garrett. She filed her application, and lived, in Portsmouth. (Tr. 539, 549). With the exception of William Womble, discussed *infra*, there is no evidence that individuals applying in Portsmouth were considered for employment in Suffolk. Second, both the Portsmouth and the Suffolk branches rarely screened and reviewed applications filed more than one month before. (Tr. 266). Ms. Harrell filed her application 102 days before Ms. Thomas and 116 days before Ms. Garrett. (Stip. Ex. #42, 235, 237, 238).[83]

12. *Beverly A. Hayes* (Stip. Par. #67)

Beverly A. Hayes, a black female, filed an application for employment as a teller or typist or "anything open" in Portsmouth on August 12, 1975. (Stip. Ex. #163). The Commission claims that three white individuals were discriminatorily preferred for

[83] No Portsmouth hiree in 1975 applied more than 55 days before the date of hiring. (Stip. Ex. #45). In Suffok, all but one of the employees hired in 1975 applied within 37 days of their hiring dates. (Stip. Ex. #42). The one exception, Macey Robertson, who applied before and was hired after the date of Ms. Harrell's application, applied 109 days before her hiring date. However, EEOC has not contended that Ms. Robertson was discriminatorily preferred over Ms. Harrell.

hire over Ms. Hayes: Nola Ann Mater, a proof operator; Harvey B. Eure, Jr., a messenger-runner; and Aaron J. Truitt, a messenger-runner. (Stip. Ex. #165-167).

In her application, Ms. Hayes stated that she desired a salary of "at least $2.52 [per] hour or over." A high school graduate, she typed and was able to operate several business machines. She had worked since 1973 as a cashier at a hospital. (Stip. Ex. #163; Tr. 603). The Court finds that she was qualified for the positions of messenger-runner and proof operator.

However, the Court finds that Nola Ann Mater was not discriminatorily preferred over Ms. Hayes. Although in reality the two were very similar in educational backgrounds and work experience. Ms. Hayes' application did not state when or how long she had worked as a cashier. Thus, if the applications of the two were compared, defendant's officials would have assumed that Ms. Mater had longer work experience. (Tr. 149-51).

Furthermore, the two applicants gave diametrically different answers to the question. "Salary expected" Ms. Mater expected only the "minimum salary." Ms. Hayes, however, expected a minimum salary of $2.52 per hour -- an amount in excess of the starting salary of $380.00 per month (or, assuming a forty-hour week and a four-week month, $2.375 per hour) that Ms. Mater was paid. EEOC has not shown that the salary paid Ms. Mater differed from the usual salary which defendant paid to new proof operators. Consequently, Ms. Hayes was rejected for two legitimate, nondiscriminatory reasons: the reasonable belief of defendant that Ms. Mater had lengthier and superior work experience; and the minimum salary requested by Ms. Hayes.

Likewise, the Court finds that Messrs. Eure and Truitt were not discriminatorily preferred for hire over Ms. Hayes. The minimum salary which she desired, $2.52 per hour, exceeded the $2.20 per hour that was paid to the two messenger-runners. Neither Mr. Eure nor Mr. Truitt, in contrast, indicated that he would accept only a certain salary. (Stip. Ex. #166, 167). Furthermore, although Ms. Hayes stated that she would accept "anything

open," the two specific positions which she desired -- teller and typist -- substantially differed in nature and duties from the position of messenger-runner. Thus, she would not normally have been considered for the two runner positions. (Tr. 151-52).

Ms. Hayes was not discriminated against because of her race.

13. *Florence C. Houston* (Stip. Par. #49)

Florence C. Houston, a black female, filed an application in Portsmouth for a position as a mail clerk. Her application is undated, however. (Stip. Ex. #106; Tr. 553-II). EEOC contends that Julie Rose Seeber, a white female, was discriminatorily preferred for hire as a part-time teller over Ms. Houston. (Stip. Ex. #88).

At the time she applied, Ms. Houston was a high school graduate and had completed one year of college. She stated on her application that she could type and operate many business machines. She had worked as a salesclerk for six months, as an "electronics helper" for six months, and as a clerk-typist since June 1974. (Stip. Ex. #106; Tr. 553-HH). The Court finds that she was qualified for a teller's position.

For several reasons, however, the Court concludes that defendant's decision to hire Ms. Seeber was not an act of discrimination against Ms. Houston in violation of Title VII. First, it is by no means clear that defendant ever reviewed the application of Ms. Houston during the screening process. (Tr. 112). The application of Ms. Houston was undated, and she testified only that she applied sometime during July 1975. (Tr. 553-DD). Ms. Seeber was hired on August 11, 1975. (Stip. Ex. #88). Thus, Ms. Houston could have applied as few as 11 days, or as many as 41 days, before Ms. Seeber was hired. Normally, the Portsmouth branches reviewed and screened only those applications filed less than one month before; indeed, in 1975 no person hired in Portsmouth before Ms. Seeber had applied more than 32 days before his date of hiring. (Stip. Ex. #45).

Second, Ms. Houston informed a designee of defendant that she desired full-time work. (Tr. 553-HH). Ms. Seeber, in contrast,

expressed a willingness to work part-time (Stip. Ex. #108) -- a factor which defendant considered important in filling part-time positions. Third, the position which Ms. Houston desired (mail clerk) so completely differed from the vacant teller's position that it is unlikely that her application was considered for part-time teller work. (Tr. 112, 997-98). Finally, defendant preferred Ms. Seeber because she lived in Virginia Beach, which was far closer to the location of the vacancy than the Portsmouth address of Ms. Houston. (Tr. 997-98). Indeed, Ms. Houston herself testified that she applied in order to avoid commuting from Portsmouth to Norfolk, where the vacancy was located. (Tr. 553-11).

Ms. Houston was not discriminated against because of her race.

14. *Barbara Jean Phipps Jordan* (Stip. Par. #59)

Barbara Jordan, a black female, applied in Suffolk on February 16, 1972, for employment as a typist or teller. (Stip. Ex. #137). EEOC argues that Deborah Underwood Simpson, a white female, was discriminatorily preferred for hire over Ms. Jordan.

In her application, Ms. Jordan stated that she was a high school graduate and had attended college for three years. Her work experience consisted of two summer jobs, one as a hospital maid and one as a clerk-typist. She could operate a typewriter and switchboard.

Deborah Simpson filed an application for a secretarial position on April 7, 1972. She was hired on June 1, 1972, as a new accounts receptionist. (Stip. Ex. #88, 139). Ms. Simpson (who, evidently, had not completed high school) could operate adding machines, calculators and dictaphones. Her skills included typing, shorthand, and bookkeeping. Ms. Simpson had some secretarial experience and she had worked as a messenger.

The Court finds that, although Ms. Jordan was qualified for the new accounts position, there were legitimate, nondiscriminatory reasons why she was not hired. She filed her application nearly two months before Ms. Simpson applied, and three and one-half months before Ms. Simpson was hired. Normally, during the

screening process, Suffolk officials did not examine applications more than one month old. Although Ms. Simpson did file her application 55 days before she was hired, none of the remaining 1972 Suffolk hirees waited more than 34 days after applying before defendant hired them. (Stip. Ex. #42). It is, therefore, extremely unlikely that the 106-day-old application of Ms. Jordan was even reviewed. (Tr. 233). Significantly, Ms. Jordan did not feel that she had been a victim of racial discrimination until the Commission suggested to her that she might be able to receive back pay if she answered its questionnaire. (Tr. 511, Stip. Ex. #21).

Ms. Jordan was not discriminated against because of her race.

15. *Vicki E. Lucas* (Stip. Par. #47)

Vicki Lucas, a black female, applied for employment as a "manager trainee" in Portsmouth on August 4, 1975. (Stip. Ex. #100). EEOC argues that Kurt S. Neumann, a white male, was discriminatorily preferred for hire over Ms. Lucas.

Ms. Lucas is a college graduate with a political science degree. In her application, she stated that she could type and use an adding machine. She had worked as a dental assistant, a teacher's assistant, and a model. When she filed her application, she wore blue jeans. (Tr. 680).

Kurt Neumann filed an application for employment on September 8, 1975, and was hired the same day for microfilming work. He was a high school graduate and had attended college for several years. He could operate an adding machine. Mr. Neumann worked as a salesman for one year and as an inspector for a paneling company for one year. He also worked in two summer jobs. (Stip. Ex. #102).

The vice president of defendant in charge of personnel testified that Mr. Neumann was a temporary employee who assisted the proof department in doing backlogged microfilming work. The duration of the job was approximately two or three months. Defendant inquired through the ranks of its staff to fill the

position and hired Mr. Neumann on the basis of the recommendation of his mother, who worked there. (Tr. 118-19).

Although the Court finds that Ms. Lucas was qualified to fill Mr. Neumann's position, there were legitimate, nondiscriminatory reasons why she was not hired. It appears that her application was never reviewed, since defendant filled the position at issue through the recommendations of its employees. As the Court has already stated, a single incident of word-of-mouth recruitment is not violative of Title VII. But even assuming *arguendo* that defendant had used the screening process here, the application of Ms. Lucas would not have been reviewed for the position. The management position that she desired was totally different in powers and duties from those of the temporary microfilming job. (Tr. 118-119). A college graduate desiring an executive position would not have been considered for a temporary job paying $2.20 per hour. Moreover, although Ms. Lucas had expressed a willingness to work full-time or part-time (Tr. 676), Mr. Neumann's position was temporary. Unlike part-time workers at the bank, he was not a regular or permanent employee.

Ms. Lucas was not discriminated against because of her race.

16. *Mavonne Hoggard Moore* (Stip. Par. #63)

Mavonne Hoggard Moore, a black female, filed an application for employment in Suffolk as a teller or secretary on July 17, 1973. (Stip. Ex. #150). EEOC contends that Deborah Lynn Daniels, a white female, was discriminatorily preferred for hire as a teller over Ms. Moore.

At the time Ms. Moore applied, she was a high school graduate and had completed two years of college, where she majored in business. She could type, do shorthand, and operate several business machines. While in school, she worked as a receptionist and clerical aide. She was interviewed by an official of defendant, Ronald Williams, who found her "intelligent" and "friendly . . . May be good prospect for teller." The Court finds that Ms. Moore was qualified for a teller's position.

Deborah Lynn Daniels applied for a teller's position on June 19, 1973. She was hired on September 15, 1973. (Stip. Ex. #88). According to Ms. Daniels' application, she was a high school graduate who had attended one year of "fashion school." She had worked for one month as a sales clerk and for one month as a mail opener. She was interviewed by an official of defendant, Thomas Hofler, who noted, "Very nice looking and poised . . . Would make a good contact person. Knows Nita Winslow [an employee of defendant]."

The Court finds that Ms. Moore was rejected for legitimate, nondiscriminatory reasons. The position for which Ms. Daniels was hired involved part-time afternoon work. Defendant had found this position extremely difficult to fill. Numerous people had previously declined the job, and Ms. Daniels was willing to take the job. (Tr. 936-37). Moreover, Ms. Moore did not believe that she had been a victim of racial discrimination. (Tr. 393-94).

Ms. Moore was not discriminated against because of her race.

17. *Delvonia Osby* (Stip. Par. #70)

Delvonia Osby, a black female, applied for employment as a typist or filing clerk in Portsmouth during 1975. (Stip. Ex. #181). EEOC contends that the following white individuals were discriminatorily preferred for hire over Ms. Osby: Nola Ann Mater, a proof operator; Carolyn Menge, a teller; Marlene Quidley, a teller; and Shirley Mae Woodland, a teller. (Stip. Ex. #183-186).

Ms. Osby stated in her application that she had diplomas from high school, a business college, and an airline personnel school. She operated several business machines and could do accounting, shorthand, and typing. Ms. Osby held one summer job and worked as a motel desk clerk for one and one-half years. The Court finds that she was qualified to work as a teller or proof operator.

However, the Court finds that Ms. Osby was rejected for several legitimate, nondiscriminatory reasons. First, EEOC has not shown that she applied before the hiring dates of the four named white

individuals. Ms. Menge was hired in May 1975; Ms. Quidley, in July 1975; Ms. Mater and Ms. Woodland, in August 1975. (Stip. Ex. #88). During direct examination, Ms. Osby testified that she had applied in March 1975 for employment beginning in November 1975 after she graduated from school. (Tr. 474-75). But on cross-examination, she stated that she had applied only after her graduation in November 1975. (Tr. 479-80). On her application, she gave November 1975 as her graduation date, answered affirmatively the question, "Graduate -- Yes/No," and wrote "diploma" in response to the question, "Type Diploma or Degree Received." (Stip. Ex. #181). Having observed the demeanor of Ms. Osby and having reviewed the evidence, the Court finds as a fact that she filed her application in November 1975. Thus, she did not apply until after the four aforementioned whites had been hired.

Second, even assuming *arguendo* that Ms. Osby filed her application in March 1975, EEOC has not shown that her application was ever reviewed or considered during the screening process for the vacancy in question. If Ms. Osby applied on the last day of March, her application would have been on file for 59 days before Ms. Menge applied, 87 days before Ms. Quidley applied, 125 days before Ms. Woodland applied, and 141 days before Ms. Mater applied. (Stip. Ex. #88). The Portsmouth branches normally reveiwed and considered only those applications filed within one month of the actual screening date. In Portsmouth during 1975, virtually all hirees were employed within one month of their application date, and no employee waited more than 55 days after applying before receiving a job offer. (Stip. Ex. #45). In contrast, Ms. Osby filed her application at least 62 days before the first of the four white individuals was hired. (Stip. Ex. #45, 88).

Ms. Osby was not discriminated against because of her race.

18. *Beverly F. Parker* (Stip. Par. #65)

Beverly F. Parker, a black female, applied for employment as a teller in Suffolk in July 1975. (Stip. Ex. #156). EEOC argues

that a white teller, Shirley Mae Woodland, was discriminatorily preferred for hire over Ms. Parker.

Ms. Parker's application stated that she was a high school graduate and had completed one year of college, majoring in business. She could do accounting and operate adding machines and calculators. Her only previous employment had been as a bag handler at a paper bag factory for one month. (Tr. 443). The Court finds that she was qualified to perform a teller's duties.

Shirley Woodland applied in Portsmouth on August 3, 1975, seeking a teller's position. (Stip. Ex. #158). She listed her mother-in-law as a relative who worked for defendant. At the time of her application, she had not graduated from high school but was preparing to take the G.E.D. test. She could type and operate adding machines, addressographs, calculators, and cash registers. Previously she had worked as a processor for almost three years, a receptionist and office helper for five months, and a waitress for four months. She was hired on August 11, 1975. (Stip. Ex. #88).

The Court finds that Ms. Parker was not a victim of racial discrimination. She applied in Suffolk, while Ms. Woodland applied for and obtained a position in Portsmouth.[84] (Stip. Ex. #54-87, 158). While it may have been true that hiring decisions with regard to vacancies in Suffolk were made jointly by the Portsmouth and Suffolk branches in 1975, there is no evidence that Suffolk applicants were considered for vacancies in Portsmouth. (See Stip. Par. #22). Consequently, officials filling vacancies in Portsmouth would not have reviewed or considered the application of Ms. Parker.

Ms. Parker was not discriminated against because of her race.

19. *Yvonne Alvonia Parker* (Stip. Par. #50)

Yvonne Parker, a black female, applied for employment in Portsmouth on September 22, 1975. (Stip. Ex. #109; Tr. 609).

[84] That Ms. Woodland applied in Portsmouth is shown by the fact that she was interviewed by Juanita Cutchin, an officer of defendant, who works in Portsmouth. (Tr. 30-31, 45-50).

She went to the bank because a teller employed by defendant told her mother that there was an opening. (Tr. 615-16). EEOC contends that Jeanette Emmett, a white female, was discriminatorily preferred for hire as a part-time new accounts receptionist and clerk over Ms. Parker.

Ms. Parker stated in her application that she had attended college for three years, working toward a degree in chemistry. She could type and operate adding machines, calculators, and tabulating equipment. Ms. Parker had held three summer jobs (as a secretary, a student aide, and a clerk-typist) and during her last year of high school was an office aide at a hospital in connection with an office training course. (Tr. 615). The Court finds that she was qualified for the position of new accounts receptionist-clerk.

Jeanette Emmett applied for employment as a secretary, clerk, or teller in Portsmouth on September 25, 1975. (Stip. Ex. #111). She listed as a reference a friend working for defendant. Ms. Emmett had a high school diploma and graduated from a course in stenography in 1948. She could do credit and typing work and operated adding machines and dictaphones. A retired civil servant, she had worked for twenty-two years as a clerk and transcriber. In addition, she was a secretary for three years.

Juanita Cutchin, a personnel officer for defendant in Portsmouth, could not remember whether the application of Ms. Parker was considered or reviewed for the vacancy in question. (Tr. 999). Ms. Emmett was not hired until October 6, 1975, two weeks after Ms. Parker filed her application. (Stip. Ex. #88). Since the two applications were filed within three days of one another, however, the Court will assume that both were considered and reviewed.

The Court finds that Ms. Parker was rejected for two legitimate, nondiscriminatory reasons. First, Ms. Emmett had superior qualifications and work history. While Ms. Parker had worked for approximately two years in office, secretarial, and clerical positions, Ms. Emmett had twenty-five years of combined clerical and secretarial experience. (Tr. 999). Second, the position

in question was part-time, and Ms. Emmett explicitly stated on her application that she was willing to work part-time. (Stip. Ex. #111). In contrast, the word "Full-time" was written on Ms. Parker's application. While Ms. Parker denied that she had made this notation, she admitted that a designee of defendant might have done so after asking her.(Tr. 618-19).

Ms. Parker was not discriminated against because of her race.

20. *Deborah A. Riddick* (Stip. Par. #86)

Deborah Riddick, a black female, applied for employment in Portsmouth on September 26, 1975. (Stip. Ex. #252). EEOC contends that Jeanette Y. Emmett, a white female, was discriminatorily preferred for hire as a part-time new accounts receptionist over Ms. Riddick.

In her application, Ms. Riddick stated that she was a high school graduate and had attended college for two and one-half years, specializing in English. She could type and had worked with adding machines and cash registers. At the time she applied, Ms. Riddick had worked since September 1974 as a salesperson at Sears and, apparently, also was employed as a substitute teacher. (Tr. 659-61). She previously had been employed as an office assistant during her first year at college. The Court finds that she was qualified to hold the position of new accounts receptionist.

Ms. Emmett applied for employment as a secretary, clerk, or teller on September 25, 1975, one day before Ms. Riddick filed her application. She was hired on October 6, 1975. (Stip. Ex. #88, 254). In her application, Ms. Emmett listed a friend employed by defendant and stated that she was a high school graduate who had also taken a course in stenography. She could do credit and typing work and operated adding machines and dictaphones. A retired civil servant, Ms. Emmett had worked for twenty-two years as a clerk and transcriber. In addition, she was a secretary for three years.

The Court finds that Ms. Riddick was not a victim of racial discrimination. Defendant hired Ms. Emmett for legitimate,

nondiscriminatory reasons. The vacant position was only part-time, and Ms. Emmett had stated on her application that she could and would work only part-time. (Stip. Ex. #254; Tr. 211). In contrast, "Full-time" was written on Ms. Riddick's application. While Ms. Riddick testified at trial that she was interested in full-time or part-time work when she applied, she did not contend that the notation was unauthorized. (Tr. 658).

In addition, Ms. Riddick desired a salary of $3.00 per hour. When she applied, she was earning $2.45 per hour at another job. (Tr. 661). Since the starting salary for the position was only $2.20 per hour, defendant would not have considered Ms. Riddick.

Ms. Riddick was not discriminated against because of her race.

21. *Iris Briley (Robinson)* (Stip. Par. #72)

Iris Briley Robinson, a black female, applied for employment as a teller or clerk in Portsmouth on August 27, 1975. (Stip. Ex. #193). EEOC contends that the following white individuals were discriminatorily preferred for hire over Ms. Robinson: Aaron J. Truitt and Harvey B. Eure, Jr., messenger-runners; Hiram S. Brice, who worked in the supply room of defendant; and Kurt S. Neumann, who did microfilming work. (Stip. Ex. #195-98).

In her application, Ms. Robinson stated that she was a high school graduate and had attended college for several years. Indeed, she needed only three semester hours to complete the requirements for a bachelor of arts degree in business administration. She typed, took shorthand, and could operate adding machines and calculators. Ms. Robinson, who had been working as a part-time telephone salesperson, stated that she was seeking full-time employment. (Stip. Ex. #193). The court finds that she was qualified for the positions held by Messrs. Truitt, Brice, Eure and Neumann.

Juanita Cutchin, an official of defendant in Portsmouth, could not recall whether the application of Ms. Robinson was considered for any of the four vacancies. (Tr. 992). Since her application was filed only nineteen days before the latest hiring date of the four

white hirees, however, the Court assumes that it was reviewed and considered.

Nonetheless, the Court finds that Ms. Robinson was rejected for the four vacancies for legitimate, nondiscriminatory reasons. First, she stated on her application that she desired an annual salary of $8,000. (Stip. Ex. #193; Tr. 553-R). This request alone removed her from consideration, for the salary she desired far exceeded that paid to the four whites. (Tr. 190-94, 993, 995). Messrs. Truitt, Eure, and Neumann received $2.20 per hour, while Mr. Brice received $380.00 each month. (Stip. Ex. #195-198).

Second, Ms. Robinson was overqualified for the messenger-runner positions held by Messrs. Eure and Truitt. At the time she applied, she needed only three additional hours of credit in order to obtain a college degree. Defendant generally did not hire college graduates for messenger-runner positions. (Tr. 994-95). Messrs. Eure, and Truitt, in contrast, had received only high school educations.

Third, the work experience of Ms. Robinson was inferior to that of Messrs. Truitt, Brice, and Eure. (Tr. 993). At the time she applied, she had been in the work force for two years, as compared with 16 years for Mr. Truitt, 15 years for Mr. Brice, and 35 years for Mr. Eure. Moreover, for the supply room position, Mr. Brice clearly possessed superior and more relevant work experience; he had done auditing and inventory work for 15 years, while Ms. Robinson's experience was confined to telephone sales.

Finally, Ms. Robinson was also rejected for the microfilming position held by Mr. Neumann because she had requested full-time employment. As described *supra*, the microfilming position was only temporary. (Tr. 996).

Ms. Robinson was not discriminated against because of her race.

22. *Marion L. Hardison (Rogers)* (Stip. Par. #81)

Marion Hardison Rogers applied for employment as a teller in Suffolk on September 26, 1974. (Stip. Ex. #232). EEOC

contends that Grace Louise Bangley, a white female, was discriminatorily preferred for hire as a teller over Ms. Rogers.

According to the completed application, Ms. Rogers had completed high school and two years of college at the time she applied. Ms. Rogers was able to type. She had worked for two years as a salesgirl and for five months as a trainee-designer at a "floral gardens." The Court finds that Ms. Rogers was qualified to perform the duties of a teller.

Grace Louise Bangley applied for employment as a teller on September 24, 1974, two days before Ms. Rogers. A high school graduate, she had worked for three years as a supermarket cashier. She could type and operte an adding machine. Ms. Bangley was hired on October 7, 1974, as a teller. (Stip. Par. #88).

The bank interviewer could not recall whether the applications of Ms. Rogers and Ms. Bangley were considered together (Tr. 934), but the Court assumes that they were, since Ms. Rogers applied between the application date and hiring date of Ms. Bangley. However, the Court finds that Ms. Rogers was rejected for a legitimate, nondiscriminatory reason. The bank interviewer in Suffolk stated that he would have preferred Ms. Bangley because she had extensive experience in cashier work and in dealing with customers. This type of experience was "invaluable" to defendant. (Tr. 932). In contrast, Ms. Rogers had not indicated on her application that she had handled large amounts of cash or operated business machines. (Stip. Ex. #232 Tr. 935). Ms. Rogers, therefore, was less experienced than Ms. Bangley, and the preference for experienced applicants is a legitimate business practice designed to reduce costs and training time.

Ms. Rogers was not discriminated against because of her race.

23. *Virginia Goodman Vines (Rollins)* (Stip. Par. #61)

Virginia Rollins applied for employment as a teller or bookkeeper in Suffolk on August 7, 1973. (Stip. Ex. #143). EEOC contends that William L. Womble, a white male, was discriminatorily preferred for hire as a part-time adjustor over Ms. Rollins.

At the time she applied, Ms. Rollins had completed high school and one year of business school. Her skills included shorthand and typing. She could operate adding machines, calculators, dictaphones, and PBX machines. Since October 1972 she had worked in another bank as a teller. She also had been a clerk-typist for one and one-half years and a keypuncher for several months. When Ms. Rollins was interviewed, the interviewer noted her bank experience and found her "rather good but not overly impressive."

William Womble applied for a teller's position in Portsmouth on October 24, 1973. He was hired as a part-time adjustor on November 5, 1973. Although he applied in Portsmouth and reported to management in Portsmouth, he worked at the Suffolk branches. (Stip. Ex. #88, 145; Tr. 1000-01). He was a high school graduate and had begun his first year of college. Mr. Womble (who listed a friend) had no work experience, although he could type and operate some business machines. The bank interviewer noted, "Interviewed for . . .any . . . [part-time] position. Very nice appearance, well mannered and very pleasant . . . Interviewed by Mr. Copeland and Mr. Melby for [part-time] adjustor at Suffolk."

As an adjustor, Mr. Womble made telephone calls to borrowers, repossessed cars, and collected money. He usually worked during the afternoon, but was expected to work at night if necessary. (Tr. 1000-01).

The Court finds that Ms. Rollins was qualified to perform the duties of an adjustor. However, the Court further finds that she was rejected for legitimate, nondiscriminatory reasons, even assuming *arguendo* that both her application and the application of Mr. Womble were available for review by the officials filling the vacancy.[85] First, Mr. Womble had indicated to bank officials that he desired part-time employment. Ms. Rollins did not, and even testified at trial that she desired only full-time employment. (Tr. 384). Second, Ms. Rollins filed her application 78 days before Mr. Womble applied and 85 to 90 days before he was hired. (Stip. Ex.

#88, 143, 145). Because officials in the Portsmouth and Suffolk branches rarely reviewed applications which had been on file more than one month, it is extremely unlikely that her application was even reached. (Tr. 241-42).[*]

Ms. Rollins was not discriminated against because of her race.

24. *Charleen Watson (Saunders)* (Stip. Par. #60)

Charleen Watson Saunders applied for employment in Suffolk. Her application is undated. (Stip. Ex. #140). EEOC contends that Deborah A. Butler, a white female, was discriminatorily preferred for hire as a part-time teller over Ms. Saunders.

When she applied, Ms. Saunders had received a bachelor of science degree in business education. She could type and operate adding machines and calculators. Ms. Saunders had worked as a secretary while in college, as a substitute teacher for one and one-half years, and as a teacher for three months. The Court finds that she was qualified to assume a teller's position.

Deborah Butler applied for employment on August 20, 1974. (Stip. Ex. #142). She could type, do shorthand, and operate many types of business machines. She had not yet graduated from high school. Her work experience consisted of a Christmas job at a department store. She was interviewed, and the interviewer noted, "Will graduate June '75. Can work afternoon (1-6). Very attractive and poised." She was hired as a part-time teller on August 23, 1974. (Stip. Ex. #88).

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[*] It is undisputed that Ms. Rollins applied in Suffolk. (Stip. Par. #61; Stip. Ex. #143; Tr. 380). Mr. Womble worked in Suffolk but, as stated *supra*, he applied in Portsmouth and reported to Portsmouth officials. It is unclear whether the Portsmouth officials filling the vacancy reviewed applications filed in Suffolk. Juanita Cutchin, the Portsmouth official who interviewed Mr. Womble, was not familiar with Ms. Rollins. (Tr. 1000).

[*] It appears that only one person hired in Suffolk during 1973 waited more than 38 days after applying before receiving a job offer. That individual was hired 88 days after applying, but EEOC does not contend that she was discriminatorily preferred for hire over Ms. Rollins. (Stip. Par. #61; Stip. Ex. #42). Application and hiring dates for Portsmouth hirees in 1973 were not submitted to the Court.

On direct examination, Ms. Saunders testified that she had applied in April 1974. (Tr. 531). In her deposition, however, she stated that she applied either during the summer of 1973 or during the summer of 1974. (Tr. 535). But even if, as the EEOC contends, she applied in April 1974, there is no evidence that her application was considered or reviewed for the vacancy in question. Ms. Butler was hired in August 1974 -- four months after the EEOC says Ms. Saunders applied. Since the Suffolk branches usually screened only those applications that had been filed less than one month before, it is extremely unlikely that Ms. Saunders' application was examined. No 1974 Suffolk hiree waited more than 46 days before receiving a job offer. (Stip. Par. #42).

The Court finds that there was another legitimate, nondiscriminatory reason why Ms. Saunders was not hired. The position in question was part-time. Suffolk officials had experienced great difficulty in filling it, and Ms. Butler indicated that she was available for the late afternoon hours required. (Tr. 929-30). On the other hand, Ms. Saunders did not indicate on her application that she was willing to work on a part-time basis or during the required hours.

Ms Saunders was not discriminated against because of her race.

25. *Sandy Michelle Milteer (Saunders)* (Stip. Par. #87)

Sandy Michelle Milteer Saunders applied in Suffolk on June 14, 1974, for a position as a teller or clerk-typist. (Stip. Ex. #255). EEOC contends that Deborah A. Butler, a white female, was discriminatorily preferred for hire as a part-time teller over Ms. Saunders.

A high school graduate, Ms. Saunders could type, operate an adding machine, and do accounting work. At the time she applied, she had worked for four months as a salesperson at a shoe store. The Court finds that she was qualified for employment as a teller.

Deborah Butler applied in Suffolk on August 20, 1974. (Stip. Ex. #257). She was hired as a teller on August 23, 1974. (Stip. Ex. #88). Ms. Butler could type, do shorthand, and operate several business machines. Although she had attended high school for four years, she had not yet graduated. Her prior work experience consisted of one Christmas job at a department store. Thomas Hofler, a Suffolk official who interviewed her, noted, "Will graduate in June '75. Can work afternoon (1-6). Very attractive and poised."

The Court finds that Ms. Saunders was not discriminated against because of her race. In late 1975 or early 1976, defendant offered her employment as a teller. She declined because of her pregnancy. (Tr. 430-31).

It can be argued, of course, that the hiring offer does not excuse any prior acts of discrimination. The Court, however, finds that Ms. Saunders was rejected in 1974 for legitimate, nondiscriminatory reasons. Although Ms. Saunders and Ms. Butler were quite similar in education and work experience, Ms. Butler could operate more business machines. More important, Ms. Butler alone had expressed willingness to work during the hours required by the position. As described *supra*, Suffolk officials had found it very difficult to find anyone willing to accept the job. It is also quite unlikely that Suffolk officials reached Ms. Saunders' two-month-old application during the screening process.

Ms. Saunders was not discriminated against because of her race.

26. *Paulette M. Scott* (Stip. Par. #88)

Paulette Scott, a black female, filed an application for employment as a "teller or other" in Suffolk on September 24, 1974. (Stip. Ex. #258). She applied in response to an advertisement in a local newspaper. (Tr. 630). EEOC contends that Grace Louise Bangley, a white female, was discriminatorily preferred for hire as a teller over Ms. Scott.

At the time she applied, Ms. Scott was a high school graduate who had received a "clerk typist diploma" from a local college. She could operate adding machines and calculators and did accounting, credit, typing, and filing work. Ms. Scott worked for short periods in two summer jobs, and since March 1974 had worked as a processor for General Electric. (Stip. Ex. #258).

Grace Louise Bangley, a white female, applied for employment as a bank teller on September 24, 1974. A high school graduate, she had worked for three years as a supermarket cashier. She could type and operate an adding machine. Ms. Bangley listed two employees of defendant as friends. She was hired as a teller on October 7, 1974. (Stip. Ex. #88).

The Court finds that Ms. Scott was rejected for legitimate, nondiscriminatory reasons. First, at the time she applied she was earning $3.10 per hour -- a salary more than 40 percent higher than the starting salary paid to Ms. Bangley. Although Ms. Scott testified that she would have accepted a salary lower than $3.10 per hour (Tr. 639-40), she did not specify on the application what salary she desired. (Tr. 641). In contrast, although Ms. Bangley was earning $4.41 per hour as a cashier, she stated on her application that she desired a salary of only $90.00 to $100.00 per week. Second, Ms. Bangley had superior work experience. In her previous jobs, Ms. Scott had measured distances between houses, operated a machine that wrapped Christmas decorations, and tested and packed television parts. (Tr. 639-41). Ms. Bangley, on the other hand, had worked for three years in cashier work and in dealing with customers -- experience that defendant considered "invaluable." (Tr. 932).

Ms. Scott was not discriminated against because of her race.

27. *Carol Denise Taylor* (Stip. Par. #89)

Carol Denise Taylor, a black female, applied for employment in "general office work" in Portsmouth on February 3, 1975. (Stip. Par. #261). EEOC argues that the following two white females were discriminatorily preferred for hire as tellers over Ms. Taylor: Carolyn A. Menge and Marlene Quidley. (Stip. Ex. #263, 264).

At the time she applied, Ms. Taylor was a high school graduate and had completed two years of college. She could type and file. Ms. Taylor had worked as a substitute teacher for two months, and spent one summer doing filing and mailing work for a hospital. The Court finds that she was qualified for employment as a teller.

Carolyn Menge applied for employment as a teller on May 29, 1975, and was hired June 3, 1975. A high school graduate who had completed two years of college, Ms. Menge had five months of experience as a cashier and worked as a library assistant during high school. She could operate an adding machine and do typing and shorthand. A bank official, Juanita Cutchin, interviewed her and noted, "Very pleasant appearance and personality. Attending ODU in morning, wants afternoon work. Has done some cashiering work and very interested in position." (Stip. Ex. #88, 263).

Marlene Quidley applied for employment for a teller's or secretarial position on June 26, 1975. She was hired as a teller on July 9, 1975. (Stip. Ex. #88). Ms. Quidley had a high school diploma and could operate an adding machine, a copying machine, and a dictaphone. At the time she applied, she had worked for nine months as a restaurant cashier while in high school. (Stip. Ex. #264).

The Court finds that Ms. Taylor was rejected for legitimate, nondiscriminatory reasons. First, it is extremely unlikely that bank officials reached or reviewed her application during the screening process for the vacancies in question. Ms. Taylor's application had been on file for 115 days at the time Ms. Menge applied and for 143 days at the time Ms. Quidley applied. The two tellers were hired 120 and 156 days after Ms. Taylor filed her application. Portsmouth officials usually did not screen applications that had been on file more than one month; indeed, during 1975 only one Portsmouth employee was hired more than five weeks after he applied. (Stip. Ex. #45).[87]

Second, even if Ms. Taylor was considered, her qualifications were inferior to those of the two hirees. Both Ms. Menge and Ms.

Quidley had several months experience in cashier work and in dealing with customers -- experience that defendant prized. Ms. Taylor had no such experience.

Finally, the vacancies in question were part-time. "Full Time" was written on the application of Ms. Taylor. (Stip. Ex. #261). While Ms. Taylor testified that she neither wrote nor authorized this notation (Tr. 555-56), she did not testify or state on the application that she desired part-time employment. Ms. Quidley and Ms. Menge, however, specifically expressed a willingness to accept part-time teller work. (Stip. Ex. #263, 264).

Ms. Taylor was not discriminated against because of her race.

28. *Lena Mae Walltower* (Stip. Par. #92)

Lena Mae Walltower, a black female, applied for employment as a cashier in Suffolk on December 5, 1975. (Stip. Ex. #274). EEOC argues that Faye B. Saunders, a white female, was discriminatorily preferred for hire over Ms. Walltower.

Ms. Walltower, at the time of her application, was a college graduate with a degree in elementary education. She could operate an adding machine and cash register. While in school, she worked as a librarian's assistant. For one year she had been a substitute teacher. The Court finds that she was qualified for employment as a teller.

Faye Saunders applied for a teller's position on November 4, 1975. She was hired on December 9, 1975, as a teller. (Stip. Ex. #88, 276). Ms. Saunders, a high school graduate, could operate adding machines, bookkeeping machines, and calculators. Since July 1975, she had worked for a local bank as a bookkeeper. Previously she was a physical therapist's assistant for two years. Wayland Pond, an official in Suffolk, interviewed her and noted, "Nice girl -- consider if opening." (Stip. Ex. #276).

[*] The longest period between the application and hiring date in Portsmouth during 1975 was 55 days, for an individual who applied in September and was hired in November. It should also be noted that the Portsmouth branches did not hire a single applicant until May 16, 1975 -- 102 days after Ms. Taylor filed her application. (Stip. Ex. #45).

The Court finds that Ms. Walltower was rejected for legitimate, nondiscriminatory reasons. While Mr. Pond was not sure whether the applications of Ms. Walltower and Ms. Saunders had in fact been compared, he stated unequivocally that he would have hired Ms. Saunders over virtually all other applicants, black or white. Ms. Saunders, unlike Ms. Walltower, had prior bank training and experience; thus, defendant would not have incurred training expenses. (Tr. 336, 939, 949).

Ms. Walltower was not discriminated against because of her race.

29. *Martha Mae Johnson (Watson)* (Stip. Par. #62)

In a letter dated March 13, 1969, Martha Mae Johnson Watson, a black female living in Suffolk, requested employment from defendant's "Personnel Manager" in Portsmouth. Joseph M. Fail, a vice president of defendant, sent Ms. Watson an application form on March 14. He stated in a cover letter that "we would appreciate your filling out" the application and "at your convenience, we will be glad to talk with you at our Suffolk office or at our Portsmouth office." (Stip. Ex. #146, 147). Upon receiving Mr. Fail's letter, Ms. Watson contacted defendant's main branch in Suffolk and made an appointment for an interview. (Tr. 584-85). At the interview, she was told that no openings existed but that she would be contacted if a position became vacant. (Tr. 585-86).

Ms. Watson testified that she does not remember whether she ever filed an application. (Tr. 586). EEOC contends that Juanita Winslow, a white female, was discriminatorily preferred for hire as a trust clerk over Ms. Watson.

The Court finds that Ms. Watson was not discriminated against because of her race. There is no evidence indicating that she ever completed and submitted an application form to defendant. Ms. Watson could not remember whether she filled out an application, and counsel for EEOC admitted that they had not found any application submitted by her. (Tr. 345). Defendant did

not consider a letter like that written by Ms. Watson on March 13 an application for employment. (Tr. 348). Even if the letter to Portsmouth could be considered an application, there is no evidence that it was ever on file in Suffolk, where Ms. Winslow has hired. (See Stip. Ex. #42). Consequently, she would not have been considered for the position held by Ms. Winslow, who applied on March 18, 1969, and was hired on April 21, 1969. (Stip. Ex. #88, 149).

30. *Percy O. White* (Stip. Par. #94)

Percy O. White, a black male, applied for employment as a mail clerk or teller in Portsmouth. (Stip. Ex. #280). He submitted the application, which was dated September 24, 1975, by mail (Tr. 575). EEOC contends that Jeanette Y. Emmett, a white female, was discriminatorily preferred for hire as a new accounts receptionist over Mr. White.

Mr. White is a high school graduate and graduated from college with a degree in sociology. Before he applied, he had worked as an electrician for 31 years and as a substitute teacher for four months. He could type and operate an adding machine. The Court finds that he was qualified for employment as a new accounts receptionist.

Jeanette Emmett applied for a position as a secretary, clerk, or teller on September 25, 1975. At the time she applied, she was a high school graduate and additionally had compelted a one-year stenography course. She worked for 22 years as a clerk-transcriber and for three years as a secretary. Ms. Emmett could operate adding machines and dictaphones. She could do credit and typing work. A bank official, Juanita Cutchin, interviewed her and noted, "Very pleasant, neat appearance . . . Would like to work just on a part-time basis." She was hired as a part-time new accounts receptionist on October 6, 1975. (Stip. Ex. #88, 282).

The Court finds that Mr. White was rejected for legitimate, nondiscriminatory reasons. First, the $100.00 weekly salary which he desired exceeded the $88.00 which Ms. Emmett would

have received, had she been a full-time employee. (Stip. Ex. #280, 282; Tr. 207). He had received $5.54 per hour as an electrician before he retired. (Stip. Ex. #280). Ms. Emmett, in contrast, desired only "scale." Second, Ms. Emmett's experience was superior. She had worked for more than twenty years as a secretary or a clerk, while Mr. White had never been employed in a secretarial or clerical capacity. Although he testified that he had "minored" in business at college and had done clerical and financial work for various organizations (Tr. 569-73), he admitted that he had not listed this information on his application. (Stip. Ex. #280; Tr. 580). Third, Ms. Emmett applied specifically for a part-time position, while Mr. White did not. (Stip. Ex. #280, 282).

Mr. White was not discriminated against because of his race.

31. *Marvin H. Wolfe* (Stip. Par. #51)

Marvin H. Wolfe, a black male, applied in Portsmouth on July 15, 1975, for employment as a teller, messenger or clerk. EEOC contends that Mary T. Catlett, a white female, was discriminatorily preferred for hire as a teller over Mr. Wolfe.

At the time he applied, Mr. Wolfe had completed high school. He also attended a local business school for four months and college for two years, concentrating on business management and administration. He could operate several business machines and do accounting, credit, and typing work. His work experience included seven years of intermittent work as a promoter-agent; two and one-half years as an assistant manager of a photography studio; one year as a driver-cashier-clerk for a grocer; and a summer job as a storekeeper. (Stip. Ex. #112).

Mary Catlett applied for employment on August 4, 1975, and was hired on August 25, 1975. (Stip. Ex. #88). She was a high school graduate who also took night courses in typing and bookkeeping. Ms. Catlett could type and operate adding machines. Before she applied, she had worked as manager of a shoe department in a women's store for eight months, clerk in a

hospital for one and one-half years, cashier in a hospital for six months, and dental assistant-receptionist for six months. (Stip. Ex. #114).

The Court finds that Mr. Wolfe was not discriminated against because of his race. It is extremely unlikely that Portsmouth officials reached his application during the screening process for the vacancy in question. He filed his application 20 days before Ms. Catlett's application date and 41 days before her hiring date. (Stip. Ex. #88; Tr. 116-17). Portsmouth officials rarely reached applications filed more than one month before the screening procedure began. Of the nine white Portsmouth hirees employed in 1975 before Ms. Catlett, only two had waited more than 18 days before receiving a job offer, and they were hired before Mr. Wolfe applied. (Stip. Ex. #45). Furthermore, Ms. Catlett's previous clerical and "cashier" experience was superior to that of Mr. Wolfe's. (Stip. Ex. #112, 114).

Mr. Wolfe was not discriminated against because of his race.

CONCLUSION

After a full examination of all the evidence and exhibits, the Court finds that EEOC has not established by a preponderance of the evidence that racial discrimination was defendant's standard operating precedure between 1969 and 1975. See *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 336 (1977). Concededly, defendant's work force was virtually all-white with the exception of maintenance personnel, before 1969. And the work force remained racially imbalanced from 1969 to 1975. But the Court finds that the imbalance was a product of pre-1969 activities. This case concerns the conduct of defendant between 1969 and 1975. The available hiring statistics, the *Hazelwood-Castaneda* analysis, the evidence concerning the hiring practices of defendant, and the 31 cases of unsuccessful black applicants who testified at trial substantially outweigh and refute the EEOC's statistical evidence. Defendant did not engage in a pattern or practice of discrimination between 1969 and 1975, and

none of the 31 applicants who testified were discriminated against because of their race.

B. *Addendum: Claimants Who Did Not Testify At Trial*

The Court ruled at trial that it would not consider the specific cases of individuals who failed to testify at trial. (Tr. 248-49). EEOC stipulated that its case would be limited to those claimants whom it produced at trial. (Order on final Pre-Trial Conference, p. 1). The Court reaffirms its earlier ruling and will not consider the cases of absent claimants in determing whether defendant engaged in a pattern or practice of discrimination or whether any specific applicants were discriminated against because of their race.

However, the twenty-one cases of applicants who did not testify have some bearing on the issue of attorney's fees, discussed *infra*. Therefore, the Court deems it appropriate to consider them with respect to that issue alone. The Court will review the applications of the hirees and black applicants, keeping in mind the testimony at trial concerning the hiring practices of defendant and the specific hirees. Hopefully, this inquiry will enable the Court to determine when the applicants applied and whether there was a possibility that any of the twenty-one "claimants" were discriminated against because of their race. Admittedly, this analysis is somewhat speculative, but it is not being conducted in connection with the issues of whether defendant did engage in a pattern or practice of discrimination or whether any of the applicants were discriminated against. Rather, for the purposes of the issue of attorney's fees, the Court is examining only when each applicant applied and whether discrimination might have existed in each case.

1. *John D. Alston* (Stip. Par. #44)

John D. Alston, a black male, applied for employment in any capacity in Portsmouth on January 6, 1975. (Stip. Ex. #89). The person allegedly discriminatorily preferred for hire over him is Rose Mary Kirsch, a white supervisor.

Mr. Alston was a high school graduate who had completed two years of college. He did typing and could operate adding machines and calculators. In addition to one summer job, he had worked as a stock clerk for one year and as a shipyard "helper" for five months. Since he had taken management courses in college, the Court finds that he was qualified to hold a supervisory position.

Rose Mary Kirsch was hired by defendant on June 7, 1965. (Stip. Ex. #88). Later she was reassigned to defendant's holding company. When an austerity program commenced in the holding company in 1975, she was reassigned to a Portsmouth branch of defendant. (Stip. Par. #36; Tr. 81-85). Defendant employed her in Portsmouth because it had originally assigned her to the holding company and felt morally obligated to re-employ her in its banking section. Furthermore, since 1975 she had acquired a wealth of knowledge and experience in banking. (Tr. 85).

On the basis of the applications and testimony, the Court finds no evidence that Mr. Alston was discriminated against. EEOC has not shown when Ms. Kirsch was transferred. Assuming *arguendo* that other applicants were considered for the vacancy, it is extremely unlikely that Mr. Alston's application would have been reached during the screening process for the vacancy unless Ms. Kirsch was transferred before March 1975. During 1975 in Portsmouth, the longest period between the application date and hiring date of any hiree was 55 days, and all but one of the hirees waited no longer than 35 days after applying before receiving a job offer. (Stip Ex. #45). Even if Mr. Alston had been considered for Ms. Kirsch's position, it is very unlikely that he would have been selected in view of Ms. Kirsch's ten years of experience and employment with defendant. Defendant's desire to retain experienced and knowledgeable employees was a legitimate business consideration.

2. *Shirley A. Barnes* (Stip. Par. #74)

Shirley A. Barnes, a black female, applied in Suffolk for employment as a teller on March 6, 1973. (Stip. Ex. #207). The person who allegedly was discriminatorily preferred for hire over Ms. Barnes is Barbara White, a white teller.

At the time she applied, Ms. Barnes was a high school graduate who had attended college for one and one-half years. For five years she had worked as a teacher's aide. She did typing and could operate an adding machine. Thomas Hofler, an official in Suffolk who interviewed her, noted, "Will take part-time teller . . . Is on an installment note here that has been nothing but trouble. Very attractive, poised."

Barbara White was hired on April 16, 1973. Her application is undated. (Stip. Ex. #88, 209). She had attended high school and some business school at the time she applied. Ms. White could type, take shorthand, do accounting work and operate several business machines. She had worked as a "general clerk" at an unknown location for an unknown period.

The Court finds no evidence on the basis of these applications that Ms. Barnes was discriminated against. Apparently, Ms. Barnes owed a debt to defendant and had been slow in repaying it. If so, defendant was justified in rejecting her as a bad credit risk who might find temptation difficult to resist as a teller. Moreover, it is by no means clear that Ms. Barnes was ever considered for the vacancy, since the application date of Ms. White is unknown. Ms. Barnes applied 41 days before Ms. White was hired, and applications which had been kept on file for more than thirty days were usually not reviewed during the screening process. (Stip. Ex. #88). Finally, Ms. Barnes' experience may not have been superior to that of Ms. White. There is no evidence that experience as a teacher's aide is of value in a teller's position, and defendant might well have judged the clerical experience of Ms. White more relevant and useful.

3. *Nita Theresa Boone* (Stip. Par. #76)

Nita Theresa Boone, a black female, applied for employment in any capacity on February 26, 1975, in Portsmouth. (Stip. Ex. #213). The white hirees who allegedly were discriminatorily preferred for hire over Ms. Boone are the following: Nola Ann Mater, a proof operator; Mary Catlett, a teller; Marlene Quidley, a teller; Julie Rose Seeber, a teller; and Shirley Mae Woodland, a teller. (Stip. Ex. #215-219).

On the basis of the applications, the Court finds no evidence that Ms. Boone was discriminated against because of her race. She applied on February 26, 1975 -- four months before Ms. Quidley and more than five months before the remaining four hirees. (Stip. Ex. #88). Because officials in Portsmouth rarely screened applications which had been on file for one month or longer, and because no employee hired in Portsmouth during 1975 waited more than 55 days after applying before receiving a job offer (Stip. Ex. #45), the Court cannot believe that her application was reached during the screening processes for any of the five positions. (Tr. 179, 181-84).

Even if the application of Ms. Boone had been reached, reviewed, and considered, defendant had a legitimate, nondiscriminatory reason for failing to hire her. In describing her past employment record, Ms. Boone noted that she had been "laid off" three times as a switchboard operator by the local telephone company. (Stip. Ex. #213). According to defendant's vice president in charge of personnel, the fact that she had been laid off "would be a flag in our face." Although Ms. Boone might have been laid off because of an austerity program, she offered no reason for the layoffs on her application. Moreover, elsewhere on the application she denied that she had ever been discharged or asked to resign, "so something doesn't jibe." (Tr. 178-79). Thus, assuming her application was reached, defendant quite reasonably could have concluded that Ms. Boone was concealing something about her past and should not be considered further.

4. *Phyllis M. Brown* (Stip. Par. #77)

Phyllis Brown, a black female, applied for employment as a teller in Portsmouth on January 29, 1975. (Stip. Ex. #220). EEOC contends that Marlene Quidley, a white female, was discriminatorily preferred for hire as a teller over Ms. Brown.

After reviewing the applications, the Court finds no evidence that Ms. Brown was discriminated against. She applied on January 29, 1975, while Ms. Quidley applied on June 26, 1975 -- nearly five months later. (Stip. Ex. #222). It is very unlikely that the application of Ms. Brown was even reached during the screening process. Portsmouth officials rarely reviewed applications that had been on file for one month or longer during screening. No person hired in Portsmouth during 1975 filed an application more than 55 days before his hiring date. (Stip. Par. #45).

Even if Ms. Brown's application was reviewed, defendant had a legitimate, nondiscriminatory reason for not hiring her. Ms. Brown admitted that she had been discharged from her previous job because of a dispute with her supervisor. (Stip. Par. #220). Although she had extensive experience as a restaurant cashier, her firing would have eliminated her from the screening process. (Tr. 178, 836).

5. *Diane C. Chapman* (Stip. Par. #79)

Diane Chapman, a black female, applied for employment in Suffolk as a teller on May 20, 1974. (Stip. Ex. #226).[*] The person allegedly discriminatorily preferred for hire over Ms. Chapman is Deborah A. Butler, a white teller. (Stip. Ex. #228).

At the time she filed her application, Ms. Chapman was a high school graduate who had also completed a six-month course in keypunching. During high school, she spent two years working as

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[*] A separate application indicates that Ms. Chapman also applied for employment with defendant in 1970. (Stip. Ex. #226). The earlier application is not in issue, however.

an office helper. Since May 1972, she had worked as a processor for General Electric. The Court finds that she was qualified for employment as a teller.

The Court, however, finds no evidence that Ms. Chapman was discriminated against. Her application was probably not reached, reviewed, or considered during the screening process for the vacancy in question. (Tr. 260). Ms. Chapman applied on May 20, 1974, and Ms. Butler applied on August 20, 1974 -- 92 days apart. Ms Butler was hired on August 23. (Stip. Ex. #88). Suffolk officials usually restricted the screening procedure to those applications which had been on file for one month or less before screening. During 1974 in Suffolk, the longest time span between the application date and hiring date of any hiree was 46 days. (Stip. Par. #42).

Assuming *arguendo* that the application of Ms. Chapman was considered, the salary which she requested probably would have removed her from consideration. Ms. Butler, who had not requested a particular salary, received $2.00 per hour. (Stip. Ex. #228). Ms. Chapman, however, listed $2.89 per hour -- the salary which she was receiving in her present job -- as "salary desired." Since this was 45 percent higher than the wage actually paid, officials might well have found her request unreasonable and rejected her accordingly, even though her education and work experience were more extensive than Ms. Butler's.

6. *Charlotte Byrd Diggs* (Stip. Par. #80)

Charlotte Diggs, a black female, applied for employment in Suffolk on August 18, 1970. (Stip. Ex. #229). EEOC contends that the person allegedly discriminatorily preferred for hire over Ms. Diggs is Rachael Brown, a white teller.

Ms. Diggs had extensive prior work experience that qualified her for a teller's position. For example, she had worked for several years in the bookkeeping department of a bank. (Stip. Ex. #229). But the Court is unable to find that she was discriminated against because of her race. The parties in this action did not supply the Court with a copy of Ms. Brown's application. It is known that

Ms. Brown was hired on August 28, 1970, 10 days after Ms. Diggs applied. (Stip. Ex. #37). However, since there is absolutely no evidence concerning the application date or the qualifications of Ms. Brown, a comparison of the two applicants is impossible.

7. *Joyce Anita Gilchrist (Beamon)* (Stip. Par. #75)

Joyce Anita Gilchrist applied for employment as a teller or clerk in Suffolk on January 3, 1973. (Stip. Ex. #210). EEOC contends that Barbara A. White, a white female, was discriminatorily preferred for hire as a teller over Ms. Gilchrist.

Ms. Gilchrist was qualified for a teller's position. In addition to a high school diploma, she had received teller training for six months in a manpower training program. She had worked as a teller in a New York bank for three months and as a cashier in a drug store for five months. Thomas Hofler, an official of defendant, interviewed her and noted, "3 mos. teller experience in N.Y. with a teller machine. Would take part-time. Immediately available."

After examining the evidence, however, the Court cannot find that Ms. Gilchrist was discriminated against. The application date of Ms. White is unknown (Tr. 262), but it has been stipulated that she was hired on April 16, 1973 -- 103 days after Ms. Gilchrist applied. (Stip. Ex. #88). During the screening process, Suffolk officials usually did not review applications on file for thirty days or more. In Suffolk during 1972 and 1973, no person was hired more than 88 days after he had filed an application. All but two persons were hired within 38 days after they applied. (Stip. Ex. #42). Thus, in all probability officials in Suffolk never reached Ms. Gilchrist's application during the screening process.

If officials did reach her application, they might well have rejected it because of the salary she requested, despite her impressive qualifications. Ms. Gilchrist requested a salary of $110.00 per week, or $2.75 per hour. Ms. White, on the other hand, requested only $75.00 to $80.00 per week, or $1.87 to

$2.00 per hour. The salary actually paid to Ms. White was $2.00 per hour. (Stip. Ex. #210, 212). Since the salary desired by an applicant was factor taken into account by bank officials during the screening process, Ms. Gilchrist might well have been rejected because she desired a salary 38 percent higher than that actually paid to new tellers.

8. *Joyce Ann Hall* (Stip. Par. #64)

Joyce Ann Hall, a black female, applied for employment as a teller or new accounts clerk in Suffolk on September 30, 1971. (Stip. Ex. #153). EEOC claims that Jo Ann Ward, a white female, was discriminatorily preferred for hire as a teller over Ms. Hall.

After examining the applications, the Court cannot find evidence of discrimination against Ms. Hall. It seems almost certain that when Ms. Ward was hired, Ms. Hall's application was not even reviewed or examined. (Tr. 235). Ms. Hall applied on September 30, 1971. Ms. Ward applied on April 19, 1972, and was hired on April 24, 1972. (Stip. Par. #88). Normally, bank officials discarded applications that had been on file for more than six months, and Ms. Hall filed her application nearly seven months before Ms. Ward. Yet, even if the application of Ms. Hall were still on file (as seems probable, since defendant was required to retain all applications until final disposition of Sandra Holland's charge had occurred), Suffolk officials rarely reviewed applications that had been on file for one month or more during the screening process. Between 1971 and 1973, no employee in Suffolk is listed as having been hired more than 95 days after he applied. (See Stip. Ex. #42).

9. *Diane Harris* (Stip. Par. #83)

Diane Harris, a black female, applied on June 1, 1975, in Portsmouth for employment as a teller. (Stip. Ex. #239). At the time she applied, she had completed high school and two years of college. EEOC contends that the following white hirees were discriminatorily preferred for hire over Ms. Harris: Carolyn A.

Menge, Marlene Quidley, Julie Rose Seeber, and Mary T. Catlett, all of whom were tellers; and Nola Ann Mater, who worked in the proof department. (Stip. Ex. #241-245).

Ms. Harris was qualified to work either as a teller or in the proof department. While she was attending high school, she worked for two years as a cashier at a market. She also had two summer jobs as a cashier during college. Ms. Harris could type and operate several business machines. (Stip. Ex. #239).

The Court cannot find that Ms. Harris was discriminated against because of her race, however. A note attached to her application reads, "Wants just for the summer." (Stip. Ex. #239). EEOC offered no evidence casting doubt on the truth of this notation. In fact, there is evidence that Ms. Harris was seeking only a summer job; she had completed only two years of college, and described herself as a "pending graduate" on her application. If Ms. Harris did want summer employment, she would not have been considered for the five vacancies. All of the five hirees were employed on a permanent basis, whether they worked full-time or part-time. Defendant rarely hired employees on a temporary basis for the positions in controversy because of the costs and time needed to train new employees. (Tr. 135-45).[49]

10. *Jessie Mae Hawkins* (Stip. Par. #48)

Jessie Mae Hawkins applied for employment as a "teller or proof" on July 30, 1975, in Portsmouth. (Stip. Ex. #103). It has been stipulated that Mozell Pettiford, the person who was allegedly discriminatorily preferred for hire as a maid over Ms. Hawkins, is also black. (Tr. 114-15). Consequently, Ms. Hawkins was not discriminated against because of her race.

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[49] Furthermore, it is unlikely that Ms. Harris's application was even reviewed for the vacancies filled by Ms. Seeber, Ms. Mater, and Ms. Catlett, all of whom applied more than two months after Ms. Harris. No person was hired in Portsmouth during 1975 more than 55 days after he applied. (Stip. Ex. #45).

11. *Sandra S. Holland* (Stip. Par. #57)

Sandra Holland, whose charge triggered the EEOC investigation in this case, claims that she applied for employment in Suffolk in May 1969. (Stip. Ex. #1). However, the parties have been unable to locate an application filed by Ms. Holland in Suffolk. (Stip. Par. #57). Ms. Holland did apply for employment in Portsmouth on October 10, 1969. (Stip. Ex. #131). EEOC contends that Maureen Copley, a white female, was discriminatorily preferred for hire over Ms. Holland. Ms. Copley applied in Suffolk on January 6, 1970, and was hired January 13, 1970. (Stip. Ex. #42).

For reasons already stated in the section of this opinion concerning jurisdiction, *supra*, the Court finds as a fact that Ms. Holland never filed an application in Suffolk. Because Ms. Copley applied in Suffolk and was hired in Suffolk, Ms. Holland would not have been considered for the vacancy. Although Ms. Holland did apply in Portsmouth, there is no evidence that applicants who filed in Portsmouth were considered for vacancies in Suffolk in 1969 or 1970. Thus, there is absolutely no evidence that Ms. Holland was discriminated against because of her race.

12. *Delilah Jane Howard* (Stip. Par. #84)

Delilah J. Howard, a black female, applied for employment in Portsmouth on August 20, 1975. (Stip. Ex. #246). EEOC contends that Aaron J. Truitt, a white male, was discriminatorily preferred for hire as a runner-messenger over Ms. Howard.

After reviewing the applications of Ms. Howard and Mr. Truitt, the Court cannot find any evidence that Ms. Howard was discriminated against because of her race. Ms. Howard applied only 26 days before Mr. Truitt's date of hire. (Stip. Ex. #88, 248), so her application may have been reviewed for the vacancy. However, apparently she desired a position as a teller, while Mr. Truitt expressed no preference. Normally, defendant did not consider for messenger-runner positions applicants who desired a teller's position. (Tr. 123). Also, at the time she applied, Ms.

Howard had attended college for four years and estimated that she would receive a degree in biology within nine months. Defendant did not hire persons with such education for runner-messenger positions because it considered them "overqualified." (Tr. 994-95). Mr. Truitt, on the other hand, had only a high school education, and his sixteen years of work experience exceeded that of Ms. Howard, who had worked as a "student clerical assistant" for two years while in college.

13. *Janice B. Howell* (Stip. Par. #58)

Janice B. Howell, a black female, applied for employment in Suffolk on April 8, 1975. (Stip. Ex. #134). She was a college graduate, with a degree in sociology. Since her graduation from college, she had worked as a substitute teacher for two years, as a teacher's aide for six months, and as an instructor at an occupational center for nine months. She could operate a calculator and type.

EEOC contends that Shirley Garrett, a white female, was discriminatorily preferred for hire as a teller over Ms. Howell. The Court has no difficulty in finding that Ms. Howell was qualified for employment as a teller, but on the basis of the applications and testimony at trial, the Court cannot find that she was a victim of discrimination. Shirley Garrett applied for employment as a teller on September 5, 1975, and was hired on September 17, 1975 (Stip. Par. #88) -- five months after Ms. Howell filed an application. Because of the five-month difference in application dates, Ms. Howell's application was probably not even reviewed. (Tr. 253). Suffolk officials usually confined their screening to applications that had been filed within one month. In 1975, all but one of the Suffolk hirees applied no more than 37 days before their dates of hire. The one exception was hired three and one-half months after she applied. (Stip. Ex. #42). Without more evidence, the Court can only conclude that Suffolk officials did not reach Ms. Howell's five-month old application during the screening process for the vacancy in question.

14. *Janis Marie Johnson* (Stip. Par. #68)

Janis Marie Johnson, a black female, applied for employment in Portsmouth on July 29, 1975. (Stip. Ex. #168). EEOC contends that the following white individuals were discriminatorily preferred for hire over Ms. Johnson: Nola Ann Mater, a proof operator; Shirley Mae Woodland, a teller; Kurt S. Neumann, a temporary employee who did microfilming; Hiram S. Brice, who worked in defendant's supply room; and Harvey B. Eure and Aaron J. Truitt, messenger-runners. (Stip. Ex. #170-175).

Ms. Johnson was qualified to perform any of the aforementioned positions. A high school graduate, she had worked for General Electric since 1970 as a processor. Prior to that job, she worked as a computer typist in a bank. She could operate adding machines and duplicators and did typing work.

The Court, however, is unconvinced that Ms. Johnson was discriminated against in the selection of persons for the vacancies in question. When Ms. Johnson filled in the space marked "Position Desired," she wrote "Clerk Typist" in large letters. Next to those words she wrote "or teller" in much smaller letters. (Stip. Ex. #168). Defendant employed very few clerk-typists. (Tr. 185). Ms. Johnson did request a teller's position, but unlike the two hirees who also named "teller" as "position desired" (Ms. Mater and Ms. Woodland), she had no experience in the cashier work which defendant desired in teller applicants. (Stip. Ex. #168, 170, 171; Tr. 185). Furthermore, it appears that Ms. Woodland, who was hired as a part-time teller (Tr. 188), had expressed a willingness to work part-time, while Ms. Johnson had not. (Stip. Ex. #169, 171; Tr. 188).

Ms. Johnson's application was probably not even reached during the screening processes to fill the vacancies ultimately occupied by Messrs. Neumann, Brice, Eure, and Truitt. Her application had been on file for 38 days before any of them applied. (Stip. Ex. #88, 168, 172-175). In Portsmouth officials rarely reviewed for a vacancy applications that had been on file for more than one month. During 1975, only one person (of 27) was

hired more than 35 days after applying. (Stip. Ex. #45). In addition, the microfilming, messenger, and supply vacancies were so different from the positions that she "desired" that she was probably never in contention for the four jobs. (Tr. 188-189). But even if she had been considered, Ms. Johnson most likely would not have obtained any of the four positions, regardless of her race. The microfilming position held by Mr. Neumann was a temporary, short-term job. Because bank officials assumed that applicants desired permanent employment (whether full-time or part-time), they bypassed the screening process in this case and used word-of-mouth recruitment among bank employees. (Tr. 188). Messenger-runner positions were generally offered to retired civil servants with long overall work experience. Mr. Eure and Mr. Truitt matched that description; Ms. Johnson did not. (Stip. Ex. #168, 174, 175). Mr. Brice, with fifteen years of experience in auditing and inventory work, appears to have been better suited than Ms. Johnson (a typist and processor) for the job of running defendant's supply department. (Stip. Ex. #168, 173).

Ms. Johnson's salary request might also have disqualified her from consideration for these positions. She requested a salary of $2.90 per hour, while the six hirees began work at salaries of $[illegible].20 or $2.375 per hour. Unlike Ms. Johnson, the hirees either made no specific salary request or desired a salary no higher than that actually paid. (Stip. Ex. #168, 170-175).

15. *Shirlene Joyner* (Stip. Par. #69)

Shirlene Joyner, a black female, applied for employment in Portsmouth on September 4, 1975. (Stip. Ex. #176). EEOC argues that the following individuals were discriminatorily preferred for hire over Ms. Joyner: Hiram Brice, who worked in defendant's supply room and ran the supply department; and Harvey B. Eure and Aaron J. Truitt, messenger-runners. (Stip. Ex. #178-180).

Ms. Joyner appears to have been qualified to do supply work or act as a messenger. She had completed high school and one year of

college at the time she filed her application. Ms. Joyner could type, do accounting, and operate an adding machine. For three years she had done typing or clerical work; indeed, on her application "clerical" was listed as the "position desired." An interviewer found her attractive and neat. (Stip. Ex. #176).

The evidence on hand, however, does not convince the Court that Ms. Joyner was a victim of racial discrimination. Persons desiring clerical positions were not normally considered for supply and messenger work. (Tr. 196-98). For runner-messenger positions, defendant preferred retired civil servants with long work experience. Having been in the work force only three years, Ms. Joyner would have been less desirable to defendant than Messrs. Eure and Truitt. Mr. Brice, who had done auditing and inventory work for fifteen years, appears to have been better suited for managing a supply department than Ms. Joyner, who had only three years of clerical and typing experience.

16. *Kathy Mitchell* (Stip. Par. #85)

Kathy Mitchell, a black female, applied for employment in Suffolk for a clerical position. Her application is undated. At the time she applied, she had completed high school and two years of college, receiving a clerk-typist's certificate. She did typing, could operate some business machines, and had completed several business-related courses. Ms. Mitchell had been employed as a library aide for one year, as a cashier-cook for seven months, and as a secretary's aide for one month. (Stip. Ex. #249).

EEOC alleges that Faye B. Saunders, a white female, was discriminatorily preferred for hire as a teller over Ms. Mitchell. The Court finds that Ms. Mitchell was qualified for employment as a teller, but it is extremely unlikely that she was discriminated against. Ms. Saunders applied for employment as a teller on November 4, 1975, and was hired on December 9, 1975. The application date of Ms. Mitchell is difficult to ascertain. In a questionnaire, she wrote that she applied during the fall of 1975, and the parties apparently stipulated that she applied in October

1975. (Stip. Ex. #88, 250). Even assuming that she did apply during October, however, her application would have been on file for a minimum of 39 days before Ms. Saunders was hired. Suffolk officials usually did not review applications that had been on file for one month or more during the screening process. After August 1975, no person was hired in Suffolk more than 35 days after she filed an application. (Stip. Ex. #42). The 35-day period occurred in the case of Ms. Saunders, when officials were filling the vacancy in controversy. Thus, the application of Ms. Mitchell probably was not even reached during screening.

Yet, assuming that Ms. Mitchell's application was reached, the application and testimony at trial indicate that she was rejected for legitimate, nondiscriminatory reasons. Ms. Saunders was working at a bank in Suffolk as a bookkeeper at the time of her application. Wayland Pond, the bank official who interviewed Ms. Saunders (Stip. Ex. #251), testified that he would have preferred her over virtually all other applicants because of her prior banking experience. (Tr. 939). Ms. Mitchell, in contrast, had not worked in a bank, although she had cashier experience.

17. *Cynthia H. Smith* (Stip. Par. #71)

Cynthia Smith, a black female, applied for employment as a teller in Portsmouth on August 4, 1975. (Stip. Ex. #187). The following white persons were allegedly discriminatorily preferred for hire over Ms. Smith: Shirley Mae Woodland and Mary T. Catlett, tellers; Nola Ann Mater, a proof operator; and Hiram S. Brice, who was in charge of defendant's supply department. (Stip. Ex. #189-192).

Ms. Smith was qualified to fill any of the aforementioned positions. During high school, she worked for nine months as a cashier. After graduation she was a cashier at a department store for 14 months. She could operate an adding machine, keep records, and do credit work. (Stip. Ex. #187).

"Full-Time" was written at the top of Ms. Smith's application. Consequently, defendant would not have considered her for the

part-time teller's position filled by Ms. Woodland, who applied on August 3 and had expressed a willingness to work only part-time. (Stip. Ex. #187, 189; Tr. 155). On the basis of the applications, the Court finds no discrimination occurred against Ms. Smith with respect to the position for which Ms. Woodland was hired.

Nor can the Court say that Ms. Catlett, who applied on August 4, was discriminatorily preferred for hire over Ms. Smith. Here the teller vacancy was full-time, and Ms. Smith had experience as a cashier. Ms. Catlett, however, had longer and more varied experience in "contact" positions; she had worked as the manager of the shoe department of a women's clothing store for four years, a clerk for one and one-half years, a cashier for six months, and a receptionist for six months. (Stip. Ex. #190; Tr. 156-57).

Nor is there enough evidence here to support a finding of discrimination against Ms. Smith with respect to the supply position occupied by Mr. Brice. Persons who listed "teller" as "position desired" usually were not considered for supply work. (Tr. 161-62). Mr. Brice also appears to have been far more qualified to manage a supply department than Ms. Smith. He performed auditing and inventory work for fifteen years, while Ms. Smith's experience was confined to two years of cashier work. (Stip. Ex. #192).

The case of Ms. Mater gives the Court some pause. Ms. Mater, like Ms. Smith, requested employment as a teller, but was hired as a proof operator. Yet the work experience of Ms. Mater (four months as a cashier, one month as a waitress, three months as a salesgirl, one month as a "floorgirl") seems inferior to the two-year cashier experience of Ms. Smith. (Stip. Ex. #191). One possible explanation for Ms. Mater's hiring lies in the relative dates of the two applications. Ms. Mater applied 15 days after Ms. Smith, and at least two-thirds of the 27 applicants hired in Portsmouth during 1975 were employed within fifteen days after they filed applications. (Stip. Ex. #45). Thus, Ms. Smith's application may never have been reached during the screening process. (Tr. 159).

Admittedly, this is somewhat speculative. Yet, without the live testimony of Ms. Smith or Ms. Mater, the difference in hiring dates is a possible legitimate explanation for the hiring decision here.

18. *Marilyn L. Vaughan* (Stip. Par. #90)

Marilyn L. Vaughan, a black female, applied for employment in Suffolk on October 16, 1975. (Stip. Ex. #265). EEOC contends that Faye B. Saunders, a white female, was discriminatorily preferred for hire as a teller over Ms. Vaughan. (Stip. Ex. #88).

Ms. Vaughan was qualified to hold a teller's position. She was a college graduate with a degree in sociology, and she could operate an adding machine. Her work experience was confined to four months' employment as an "eligibility worker" for the Suffolk Social Services Department under the CETA program.

After examining the application of Ms. Saunders, the Court cannot find that Ms. Vaughan was discriminated against. Ms. Saunders was only a high school graduate, but had more extensive and more relevant work experience. At the time she applied (November 4, 1975), she had worked as a bookkeeper for four months in a Suffolk bank. Before assuming that position, she was a physical therapy aide at a hospital for two years. She could operate adding, bookkeeping, and calculating machines. (Stip. Ex. #267). Wayland Pond, the bank official who interviewed Ms. Saunders, testified that he would have hired her over almost any applicant because of her prior banking experience. (Tr. 939). Ms. Saunders, of course, had no such experience.[20]

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[20] There are other possible legitimate reasons for Ms. Vaughan's rejection. She was a college graduate, and defendant was extremely reluctant to consider college graduates for teller positions. Also, she applied nearly two months before Ms. Saunders was hired. (Stip. Ex. #88).

19. *Cynthia D. Wallace* (Stip. Par. #91)

According to her application, Cynthia D. Wallace, a black female, applied for full-time employment on August 26, 1975, in Portsmouth. (Stip. Ex. #268). She desired teller, clerical, or accounting work. (Stip. Ex. #268). The following white individuals allegedly were discriminatorily preferred for hire over Ms. Wallace: Kurt S. Neumann, who did temporary microfilming work; Aaron J. Truitt and Harvey B. Eure, Jr., messenger-runners; and Hiram S. Brice, who managed defendant's supply department. (Stip. Ex. #270-273).

Ms. Wallace was qualified for employment as a teller, messenger, or supply worker. She was a high school graduate who had completed four years of college, specializing in business. Ms. Wallace could operate adding machines and calculators, typed, and did accounting work. While she attended college, she worked for 17 months in various capacities -- sales clerk and office worker, for example. (Stip. Ex. #268).

Despite her qualifications, the Court cannot conclude on the basis of the evidence before it that Ms. Wallace was discriminated against. Defendant would not have considered her for the temporary, two-to-three month microfilming position held by Mr. Neumann because it assumed that applicants wanted permanent employment. Moreover, Ms. Wallace apparently indicated to the designee who received her application that she desired full-time employment.

Nor is there evidence to support a finding that Ms. Wallace was discriminated against for the runner-messenger positions. For these positions, defendant preferred to hire retired civil servants with long experience in the work force. Ms. Wallace, unlike Mr. Eure and Mr. Truitt, did not meet this description. Her educational background also handicapped her. Although she stated that she had not yet graduated from college, she had attended college for four years -- an indication that her graduation date was in sight. Defendant normally did not hire such "overqualified" persons for runner-messenger positions. (Tr.

995). Finally, the Court is not convinced that the filling of the supply position was racially discriminatory. Mr. Brice's length of service in the work force and experience in auditing and inventory work made him a superior candidate for the job of managing and operating the supply department. Ms. Wallace, although well-educated in business, had not indicated that she had experience or interest in supply work.

20. *Demetrius A. Watkins* (Stip. Par #93)

Demetrius A. Watkins, a black male, applied for employment as a teller in Suffolk on September 22, 1974. (Stip. Ex. #277). EEOC contends that Grace Louise Bangley, a white female, was discriminatorily preferred for hire as a teller over Mr. Watkins.

At the time he applied, Mr. Watkins had completed two years of college, specializing in accounting. He could type and operate several business machines. His work experience consisted of two summer jobs -- one as an assembler in a plastics factory and one as an "enumerator" in compiling a city directory. The Court finds he was qualified for work as a teller.

However, testimony at trial and the application of Ms. Bangley strongly indicate that Mr. Watkins was not discriminated against because of his race. Ms. Bangley, a high school graduate who applied on September 24, 1974, had been employed as a cashier in a supermarket for three years. This long experience in handling large amounts of cash and in dealing with customers was "invaluable" to defendant and made her far more qualified for a teller's position than Mr. Watkins, who had no such experience.

21. *Gloria Jean Willie* (Stip. Par. #95)

Gloria Jean Willie, a black female, applied for employment in any capacity in Suffolk on August 27, 1974. (Stip. Ex. #283). EEOC argues that Grace Louise Bangley, a white female, was discriminatorily preferred for hire as a teller over Ms. Willie.

Ms. Willie was qualified for employment as a teller. She was a college graduate with a degree in sociology. Her skills included

typing and the ability to operate adding and copying machines. For one year she worked as a teacher's aide.

Grace Louise Bangley, a high school graduate, applied for employment as a teller on September 24, 1974 -- four weeks after Ms. Willie. Ms. Bangley's experience was clearly longer and more relevant to the duties of a teller than Ms. Willie's. For three years as a cashier, Ms. Bangley acquired experience in handling large amounts of cash and customers -- experience considered invaluable by defendant -- while Ms. Willie had worked only as a teacher's aide for one year. (Stip. Ex. #283, 285; Tr. 932). In addition, defendant normally would have considered Ms. Willie overqualified for a teller's position because of her college degree.

The Court concludes that the EEOC has failed to carry its burden of establishing that defendant engaged in a pattern or practice of racial discrimination in hiring from 1969 to 1975. Nor has the Commission shown that any of the individual claimants who testified at trial were denied employment because of their race. Furthermore, the Court finds that American National Bank has made extensive efforts to recruit qualified minorities through affirmative action. Those activities were reviewed on pages 89 and 90 of this opinion.

III. *Prejudice*

Having found no discriminatory conduct on the part of defendant during the period at issue in this action, the Court finds it unnecessary to determine whether defendant has been prejudiced through the passage of time in its ability to defend this action.

IV. *Attorney's Fees and Costs*

Defendant petitions for an allowance of attorney's fees. The Court agrees that an award of attorney's fees to defendant is justified here.

Section 706(k) of the Civil Rights Act of 1964 provides:

> In any action or proceeding under this subchapter the court, in its discretion may, allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs and the Commission and the United States shall be liable for costs the same as a private person.

42 U. S. C. § 2000e-5(k).

In *Christianburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), the Supreme Court of the United States described the circumstances under which an attorney's fee should be allowed when the defendant is the prevailing party in a Title VII action. *Christianburg* held that a district court may in its discretion award attorney's fees to a prevailing defendant upon a finding that the EEOC's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. If EEOC is found to have brought or continued a claim in bad faith, there will be an even stronger basis for charging it with the attorney's fee incurred by the defense. *Id.* at 421-22. However, the Court added the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear

questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

On the basis of the evidence, the Court finds that the EEOC's action here was unreasonable, vexatious, and litigated in bad faith. The reasons for this finding are the following:

1. EEOC has never attempted to offer an excuse for the extraordinary delays in this case, other than its heavy workload. Perhaps that workload can explain why the EEOC did not commence an investigation until nine months after Sandra Holland filed her charge, and why the area director issued no findings of fact until eighteen months after the filing of the charge. Yet the Court simply cannot believe that the EEOC was unable to issue its "Determination" until March 1974 -- nearly five years after Ms. Holland filed her charge -- solely because of a heavy workload. Furthermore, the EEOC waited seventeen months after conciliation efforts failed in August 1974, before filing this suit. While it is true that the EEOC was entitled to postpone action for a reasonable period after it notified Sandra Holland of her right to sue in August 1974, by the end of 1974 it should have been clear to EEOC that Ms. Holland would not sue. Yet the EEOC took no action throughout 1975 and did not file this suit until January 21, 1976. Thus, more than six and one-half years elapsed between the filing of the Holland charge and the filing of this action.

Nor can the delays in this case be attributed to complexities of issues. This is not a particularly involved case. All the evidence indicates that the EEOC's investigation was confined to the Suffolk branches, in which fewer than 35 people were in the work force at any given time after 1968. (Stip. Ex. #54-87). The hiring practices of defendant were not complex or difficult to understand. There is no evidence that defendant "stonewalled" the investigation.

2. It cannot be said that Ms. Holland's charge was, on its face, baseless. A report filed by defendant with the EEOC in May 1969 admitted that blacks comprised only 5.5 percent of the total work force in all branches, and all nine of the black employees were service personnel. (Stip. Ex. #54-87).

In bringing this action, however, EEOC has challenged on the actions of the defendant on or after May 1969. One might reasonably expect that the 1974 reasonable cause determination would have examined the hiring decisions and practices of defendant since May 1969 until a short time before the issuance of the determination. Yet the determination reviews defendant's practices only through early 1970. (Stip. Ex. #16). Thus, the EEOC brought this suit in 1976, alleging discrimination between 1969 and 1975, on the basis of a 1974 report that covered only the activities of defendant through early 1970. Admittedly, the general hiring practices and procedures of defendant remained relatively unchanged during this period, and an investigation must end sometime before a report is to be written. Nonetheless, there is absolutely no evidence that, when it brought this suit challenging the employment practices of defendant between 1969 and 1975, the EEOC had made any investigation of post-1970 activities. Defendant had filed annual reports with EEOC since 1969, but the reasonable cause determination made no mention of them.

3. Despite the six and one-half year period of investigation and preparation after the filing of Ms. Holland's charge, EEOC could not name a single victim of discrimination (in addition to Ms. Holland) at the time it filed this suit. *EEOC* v. *American National Bank*, 420 F. Supp. 181, 186, *vacated and remanded*, 574 F.2d 1173 (4th Cir.), *cert. denied*, 99 S. Ct. 213 (1978). EEOC did not even examine the applications filed in Portsmouth during 1975 and in Suffolk between 1969 and 1975 before this suit had commenced. Not until July 6-7, 1976, and August 11, 1976 -- shortly before the scheduled final pretrial conference and

termination of the discovery period -- did EEOC identify the 51 additional "claimants." (Stip. Par. #12-18).

4. EEOC led defendant to believe, at least through the issuance of the reasonable cause determination in 1974, that only the Suffolk branches were under investigation here. In fact, the determination termed "irrelevant" any information concerning the hiring practices of the Portsmouth branches. (Stip. Ex. #16). Thus, defendant discarded pre-1975 applications in Portsmouth. (Stip. Par. #35). When this suit was commenced in 1976, defendant had no means of producing Portsmouth applicant-flow data for years prior to 1975 that could be employed to refute the EEOC's evidence.

EEOC apparently argues that defendant discarded the pre-1975 Portsmouth applications maliciously, with the intent of destroying damaging evidence. The evidence in this case is completely to the contrary. According to the 1974 reasonable cause determination, defendant supplied information concerning blacks hired in Portsmouth. It is probable that, to obtain such information, defendant examined applications on file. More important, an employer hardly could be expected to retain Portsmouth applications on file for several months or years after the EEOC had called "irrelevant" all information concerning the Portsmouth branches. After all, defendant normally kept applications on file only for a period of six months. Assuming that normal practice was followed, no pre-1975 applications would have been on file when this suit was commenced in early 1976. The Court cannot accept EEOC's argument that, in effect, "irrelevant" did not actually mean "irrelevant." Defendant discarded its Portsmouth records in justifiable reliance upon the 1974 reasonable cause determination. Inclusion of Portsmouth activities in this action was, therefore, totally unreasonable.[91]

[91] If defendant had in fact deliberately discarded the applications before the 1974 report, surely EEOC would have called such action to the attention of this Court. Similarly, had defendant withheld existing pre-1975 applications, EEOC would have filed a motion to produce.

5. *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976), which permitted the EEOC to file suit for discrimination developed in the course of a reasonable investigation of the original charge if such discrimination was included in the reasonable cause determination, was issued by the United States Court of Appeals for the Fourth Circuit on January 22, 1976 -- one day after EEOC filed its complaint here. The EEOC never investigated the activities of the Portsmouth branches before the 1974 determination, which confined its discussion to the Suffolk branches and labeled the activities of the Portsmouth branches "irrelevant." There is absolutely no indication that the conciliation effort included discussion of possible changes in the Portsmouth branches. Yet the EEOC in this suit alleged discrimination by the Portsmouth and Suffolk branches between 1969 and 1975, and has pursued these allegations even after *General Electric* was decided.

The Court of Appeals did not indicate that *General Electric* was to be prospective in effect in requiring that the EEOC have included matters in the reasonable cause determination before filing suit on them. Courts had indicated before *General Electric* that EEOC could not file suit on matters not included in the determination. See, *e.g.*, *EEOC* v. *E. I. duPont de Nemours and Co., Chestnut Run and Affiliated Facilities*, 373 F. Supp. 1321, 1336 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975) ("the determination of reasonable cause defines the framework for conciliation"). The reasonable cause determination is intended to inform the employer of possible violations of Title VII and to provide an opportunity for conciliation. EEOC does not have a *carte blanche* to term the activities of the Portsmouth branches "irrelevant" in the 1974 determination and subsequently make them a subject of this litigation. Congress required EEOC to make a reasonable cause determination and engage in conciliation procedures before a suit can be filed. 42 U.S.C. § 2000e-5(b), (f). EEOC has attempted to circumvent the requirements of Congress and the holding of *General Electric* by "tacking," in this action,

allegations concerning the Portsmouth branches onto the charges against the Suffolk branches which were discussed in the 1974 determination. This about-face is unreasonable and should not be condoned.

6. In the Order on Final Pre-Trial Conference, EEOC indicated that it would call as witnesses 49 of the 52 black applicants (including Sandra Holland) whom it had identified in 1976 as victims of discrimination. Yet only 31 of those applicants appeared at trial, not including Sandra Holland, whose testimony was ruled inadmissible because EEOC produced her only during its attempted rebuttal. Thus, 40 percent of the "claimants" for whom EEOC had sought back pay did not testify.

The Court realizes that parties often find it difficult to produce witnesses, and unforseen circumstances can prevent the appearance of a witness. Yet it appears from the file that the EEOC did not request the issuance of subpoenas to its own witnesses until December 11 and 12, 1978 -- the first two days of trial. (*e.g.*, Tr. 1058-1059). Such last-minute requests are unreasonable and indicate bad faith on the part of EEOC. Of the 52 "claimants," only Sandra Holland had filed any charge against defendant with the Commission. Most of them heard of this case only in March 1976, when EEOC sent them a questionnaire and an accompanying letter which informed them that "you may have been discriminated against [and] . . .you may be entitled to [back pay]." (Stip. Ex. #21). Because trial began almost three years later, it was incumbent upon the EEOC to request subpoenas sufficiently in advance of the trial to insure the appearance of as many claimants as possible. Not only did EEOC delay its request until the first two days of trial; when it rested its case-in-chief, the Commission also sought to introduce several of the absent witnesses' depositions into evidence without even attempting to explain the reasons why they were admissible under *Fed. R. Civ. P.* 32(a). (Tr. 823-26). And, knowing that subpoenas had been issued on the first two days of trial, counsel for EEOC nevertheless questioned bank officials about "claimants" who never appeared.

(Tr. 80-85, 122-23, 133-45, 155-62, 178-89, 194-203, 234-35, 252-54, 258-66, 294-98, 337-39).

Despite the ample discovery time allowed in this case, and the two and one-half year period between this Court's granting of summary judgment and the trial, the EEOC was obviously and woefully unprepared at trial. At times counsel for EEOC objected to the admission of evidence by defendant without being able to specify the exhibits to which he was objecting or the grounds for his objection. (Tr. 865-79). Many of the identified black applicants were so obviously not comparable to the hirees who allegedly were discriminatorily preferred over them that the "comparisons" were frivolous. Some of the hirees to which the claimants had been compared were black. Many claimants did not apply in the same city where the vacancy in question existed, or applied for jobs completely different from the vacancy, or requested hours or wages different from those of the vacancy. Many applied so long before the vacancy was filled that their applications would never have been reviewed. The lack of comparability in such cases would have been obvious had EEOC properly conducted discovery.

The Court recognizes that EEOC has an important mission. That mission, however, does not justify the conduct of the Commission in this case. The Court concludes, for the reasons stated, that attorney's fees will be awarded to defendant pursuant to 42 U.S.C. § 2000e-5(k). In addition, for the reasons stated, costs will be awarded to defendant pursuant to 28 U.S.C. § 2412. A separate Order consistent with this opinion is entered simultaneously herewith.

s/ J. Calvitt Clarke
United States District Judge

June 25, 1979
Norfolk, Virginia

APPENDIX C

Order of the United States Court of Appeals for the Fourth Circuit Denying American National Bank's Petition for a Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1533

Equal Employment Opportunity Commission,

Appellant,

versus

American National Bank,

Appellee.

On Suggestion for Rehearing En Banc.

Submitted August 4, 1981. Decided May 18, 1982

(Constance L. Dupre, Acting General Counsel, Philip B. Sklover, Acting Associate General Counsel, Vella M. Fink, Assistant General Counsel, William H. NG, for Appellant; Paul M. Thompson, Thomas J. Manley, Gregory B. Robertson, Hunton & Williams, for Appellee.)

ORDER

The appellee's petition for rehearing and suggestion for rehearing en banc has been considered by the court.

The panel considered the petition for rehearing and decided, Judge Russell dissenting, that it should be and it is denied.

On a poll of the court on the suggestion for rehearing en banc, the court was evenly divided. Because a majority of the judges in regular active service did not vote in favor of rehearing en banc, that suggestion in motion is denied. From this denial, Judge Russell, Judge Widener, Judge Hall, Judge Ervin, and Judge Chapman dissent, and Judge Widener has filed a dissenting opinion in which Judge Russell joins.

Entered at the direction of Judge Phillips.

FOR THE COURT

s/s William K. Slate, II
Clerk

WIDENER, Circuit Judge, dissenting:

I would respectfully add a word of dissent.

I dissent because there are significant errors in both the district court and panel opinions concerning the appropriate use of statistical evidence in employment discrimination cases. These errors, I think, may only, at best, confuse the law of employment discrimination in this circuit.

The errors in using the statistics are two-fold. First, the district court failed to employ a proper statistical analysis in arriving at its conclusion that the employment statistics demonstrated a prima facie case of employment discrimination. The panel majority compounded this error when it adopted the district court's finding. Second, this majority erred in its use of statistical rebuttal evidence. Correct statistical analysis shows that the EEOC never demonstrated a prima facie case here (especially for Suffolk), and assuming, *arguendo*, that a prima facie case was presented, the defendant provided sufficient rebuttal evidence.[1]

I. PRIMA FACIE CASE

The Supreme Court has reasoned that statistical evidence may alone establish a prima facie case of racial discrimination. See, *e.g.*, *Hazelwood School District* v. *United States*, 433 U. S. 299, 307-08

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[1] In this connection, I should point out that both the district court and the panel majority have apparently treated evidence offered by the defendant when its turn came as evidence only tending to rebut a prima facie case which had been made. While this is, of course, an appropriate use of evidence offered in rebuttal, an equally appropriate use and one just as often made of evidence is that which tends to show that the basic facts on which a plaintiff's case is made do not exist, thereby decrying the existence of a prima facie case. As the foregoing applies to this case, applicant flow statistics are admissible as evidence in chief by a plaintiff as well as when offered in rebuttal by a defendant. *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, esp. n. 13, p. 308 (1977); *Hester* v. *Southern Railway Co.*, 497 F2d 1374 (5th Cir. 1974). And, when in evidence, they should be used for whatever their probative value is, either to make a case, to rebut a prima facie case made, or to show that a prima facie case does not exist.

(1977); *Teamsters* v. *United States*, 431 U. S. 324, 339 (1977). Nevertheless, it is essential that a court's utilization of statistics be mathematically correct in order to prevent an invalid conclusion. In the instant case, the district court found a prima facie case of discrimination exclusively on the basis of employment statistics.[2] The court compared the percentage of blacks in the defendant's office/clerical work force to the percentage of blacks in comparable jobs in the respective geographic areas. It concluded:

> that there has been consistent underrepresentation of blacks on the work force of defendant between 1969 and 1975. . . The fact remains. . . that the percentage of blacks in defendant's total work force has remained at least 15 percent below the percentage of blacks in the available work force of any of the communities comprising the two relevant labor market areas.

EEOC v. *American National Bank*, 21 E.P.D. (CCH) ¶ 30,369 at 13,057 (E.D. Va., June 25, 1979). The opinion continued "The Court finds, therefore, that the statistical evidence presented here by the EEOC is prima facie statistical proof of a pattern or practice of discrimination." *Id.* at 13,058.

The panel majority followed the district court and adopted the finding of a prima facie case, concluding:

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[2] The Supreme Court has noted that prima facie employment discrimination cases can rest both on statistical and non-statistical evidence. *Teamsters* v. *United States*, 431 U.S. 324, 339 (1977); see W. Connolly & D. Peterson, Use of Statistics in Equal Employment Opportunity Litigation, 15-16 (1980). In the instant case, however, the district court found that the non-statistical evidence presented by the EEOC, which included evidence of certain personnel practices and the experience of 31 black applicants, did not demonstrate racial discrimination. *EEOC* v. *American National Bank*, 21 E.P.D. ¶ 30,369 at 13,098-13,099 (E.D. Va., June 25, 1979). Thus, its only basis for establishing a prima facie case was statistical evidence. *Id.* at 13,058.

> These statistical disparities are substantial, in some cases reaching the 'inexorable zero' point. *Teamsters*, 431 U. S. at 342 n.23. They show that blacks were consistently underrepresented in the office and clerical categories in branches in both cities and underrepresented in the officials and managers categories in Suffolk all years and Portsmouth for four of seven years. The district court's conclusion, that considered alone, they establish a prima facie case is firmly supported by the record. (Emphasis added).

EEOC v. *American National Bank*, 652 F2d 1176, 1190 (4th Cir. 1981).

In my opinion the conclusions of the panel majority and that of the district court are equally incorrect.

In reaching their conclusions using straight percentage comparisons of actual and expected percentages of minority employees, the courts contravened both common statistical principles and Supreme Court precedent. Statisticians do not simply look at two figures, in this case the actual percentage of black employees compared with the percentage available, and make a subjective conclusion, as did the courts here, that the figures are significantly different. Rather, statisticians compare figures through an objective process known as hypothesis testing. C. Hicks, Fundamental Concepts in the Design of Experiments, 15 (1973) (hereinafter Hicks); F. Mosteller, R. Rourke & G. Thomas, Probability With Statistical Applications 302-05 (2d ed. 1970) (hereinafter Mosteller, Rourke & Thomas); R. Winkler & W. Hays, Statistics: Probability, Inference, and Decision, 402-03 (2d ed. 1975) (hereinafter Winkler & Hays). The process of hypothesis testing is readily adapted to employment discrimination statistics as they follow regular statistical formulae. See W. Connolly & D. Peterson, Use of Statistics in Equal Employment Opportunity Litigation, 74-83 (1980) (hereinafter Connolly & Peterson).

In hypothesis testing, the statistician sets a null hypothesis, which he subsequently seeks to disprove through the use of various objective mathematical formulae. Hicks, *supra* at 15-16; Mosteller, Rourke & Thomas, *supra* at 303-04. If the hypothesis is disproven, the statistician can state, to a given precision, that the two statistics are in fact different. Hicks, *supra* at 16; Mosteller, Rourke & Thomas, *supra* at 305-06. In the situation of racial employment discrimination statistics, the null hypothesis is that the actual and expected percentages of minority employees are equal. If the null hypothesis is rejected, then one can say, with a given precision, that the difference between the two percentages is not the result of random chance.

The process of hypothesis testing is not an academic exercise for substituting objective mathematical criteria for the judgment of a court of law. Rather, it is a means of according mathematical credibility to statistical evidence used in the litigation process. It is axiomatic in statistical analysis that the precision and dependability of statistics is related to the size of the sample being tested. K. Hammond & J. Householder, Introduction to the Statistical Method, 299 (1962) (hereinafter Hammond & Householder); Winkler & Hays, *supra* at 444-47.[1] Without the use of hypothesis testing, a court may accord credibility in law to statistics which are not deserving of mathematical credibility. Such a situation often arises when the employment situation under

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[1] The precision of statistics increases as the size of the sample increases. For instance, if a sample of four items is drawn from a large group of items and one of those items has a characteristic which sets it apart from the others, one must say that 25% of the sample has that characteristic. However, one would hesitate to state that 25% of the full group has that characteristic because it is realized that if two items with that characteristic had been drawn, it would have led to a percentage of 50%; if no items with that characteristic had been drawn, it would have required one to state that 0% of the large group had that characteristic. It is apparent that drawing conclusions on the basis of a sample of four is very imprecise. On the other hand, a sample of 25 items would be much more precise because a difference of one item with a given characteristic would lead to a change of only 4% in the final statistic.

consideration involves a small number of people, such as in the instant case.[1]

The Supreme Court has recognized the danger of making comparisons between the percentages of minority population without further mathematical analysis. In *Mayor* v. *Educational Equality League*, 415 U. S. 605 (1974), the Court reversed a court of appeals finding of discrimination in the make-up of a commission to nominate members of the Philadelphia school board. The court of appeals had found it significant that while 60% of the school population was black and 34% of the city's population was black, only 15% of the 13 member nominating board was black. The Supreme Court said: "[T]he District Court's concern for the smallness of the sample represented by the 13 member panel was well founded. The Court of Appeals erred in failing to recognize the importance of this flaw in straight percentage comparisons." *Id.* at 621 (emphasis added).

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[1] Hypothesis testing accounts for small sample sizes by using mathematical formulae which vary with the size of the sample. The effect of sample size in the formula used for testing racial statistics is included later, although a brief example here will help illustrate the effect of sample size. Assume there is a very large population that is 20% black. A sample of this population would also be expected to be 20% black, but suppose a certain sample is only 12% black. A statistician would state that this difference was significant (i.e. that it was not due to chance) with certain degrees of precision depending on the size of the sample. For instance, if there were 1000 people in the sample, a statistician would say with a 99.9% degree of precision that the difference between actual and expected black population was significant. If 100 people were in the sample, the precision falls to 95%; with 50 in the sample, the precision is 84%;with 25 it is 68%; with 10 it is 47%; and with 5 it is 14%.

Statisticians do not usually state their conclusions in terms of the degree of precision. Rather, they state whether the difference between actual and expected values is statistically significant at a given confidence level. Statisticans usually use 95% or 99% confidence levels. Winkler & Hays, *supra* at 413. Thus, in the foregoing sample, only when the sample is 100 or larger would a statistician find the difference between 20% and 12% statistically significant.

In the instant case, both the district court and the panel majority, in finding a prima facie case had been proven by statistics, committed the same error of drawing conclusions from straight percentage comparisons without taking into account sample size at all.[1] That majority justified its finding of a prima facie case through the use of straight percentage comparisons by saying:

> As frequently observed by the Supreme Court, and as recognized by the district court, gross statistical disparities in the static work force during the relevant period may alone constitute prima facie proof of the discriminatory practice. *Hazelwood*, 433 U. S. at 307-08; *Teamsters*, 431 U. S. at 335 n. 15, 339 n. 20; *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265-66 (1976).

652 F2d at 1189. The panel majority and the district court before it, however, did not consider a footnote in *Hazelwood* where the Supreme Court explained the meaning of statistical disparity. The Supreme Court said, "A precise method of measuring such statistical disparities was explained in *Castaneda* v. *Partida*, 430 U. S. 482, 496-497 n. 17. It involves the calculation of the 'standard deviation' as a measure of the predicted fluctuations from the sample." 433 U. S. at 309, n. 14. Clearly then the term "gross statistical disparity" in the *Hazelwood* opinion does not mean a seemingly large difference in straight percentage comparisons; it means disparities must be found at the conclusion of statistical analysis using standard deviations.

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[1] Population samples of less than 30 to 40 are generally considered to be small samples and require special treatment in certain statistical analyses. P. Hoel & R. Jessen, Basic Statistics for Business and Economics, 190 (1977); Winkler & Hays, *supra* at 366. In the instant case, the defendant employed between 12 and 28 office-clerical employees at its Suffolk branches and between 92 and 132 office/clerical employees at its Portsmouth branches.

The methodology for computing the standard deviations of employment discrimination statistics is well documented elsewhere and need not be reviewed in detail here. See *EEOC* v. *United Virginia Bank/Seaboard National*, 615 F2d 147, 151 (4th Cir. 1980); Connolly & Peterson, *supra* at 74-88. I have noted in the margin, however, the way such formulae account for small samples as are present here.[6] It is important to emphasize that such formulae are of no value, and thus statistical evidence is also of no value, unless a court employs them at the proper point in the judicial process and that point is before the court finds a prima facie case on the basis of statistical evidence.

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[6] As is well documented, the standard deviation for a binomial distribution is $\sqrt{np(1-p)}$ where n is the size of the selected sample and p is the proportion of individuals in the total population possessing the characteristic which is being investigated. Connolly & Peterson, *supra* at 80. Sample size is thus an important element of this computation. The figure derived by the above formula can be converted to a figure which gives the standard deviation in terms of percentages rather than numbers. This figure is known as the standard error and equals $\sqrt{\frac{np(1-p)}{n}} = \sqrt{\frac{p(1-p)}{n}}$.

Inspection of this latter computation shows that as the sample size gets smaller, the standard error gets larger, thus demonstrating that small sample sizes cause larger allowed deviations and are thus less reliable. See Winkler & Hays, p. 308.

Another method for compensating for small sample sizes is known as the "student's t" distribution. In the *Castaneda* opinion, the Supreme Court noted that with large sample sizes statistics that differed by more than two or three standard deviations would lead a social scientist to reject the hypothesis that the difference between the actual and expected numbers was due to chance. 430 U.S. at 497 n.17. Two to three standard deviations correspond to a 95% to 99.9% significance level. Winkler & Hays, *supra*, at 355-58. The "student's t" distribution teaches that when there is a sample size of less than thirty, the number of standard deviations must be increased in order to acheive the same significance level. See Winkler & Hays, *supra*, at 366; Mosteller, Rourke & Thomas, *supra* at 437-38. For example, tables for use with the "student's t" distribution show that with a sample size of 15, one needs to use 2.1 standard deviations for a 95% confidence interval and 3.8 standard deviations for a 99.9% confidence interval. For a sample size of 5, the standard deviations become 2.8 and 7.1 respectively. Winkler & Hays, *supra* at xv.

In the instant case, the district court prepared a standard deviation analysis of the defendant's static employment figures as part of its consideration of rebuttal evidence. I have prepared a further analysis using slightly different assumptions and those statistics appear in the margin.* Concerning the defendant's Suffolk branches, both the district court's and my analyses show that the difference between the actual and expected percentages of black employees is less than two standard deviations for almost all years regardless if the statistics are compared to Suffolk, Nansemond County or the combined populations. In the *Castaneda* opinion, the Supreme Court noted that "if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis . . . that the difference was due to chance would be suspect to a social scientist." 430 U. S. at 497 n.17.[9] Here, under *Castaneda* and *Hazelwood*, since the number of standard deviations is less than that figure, one may not conclude that the difference between actual and expected black employment is statistically significant or that the figures demonstrate a prima facie case of employment discrimination.

It has just been shown that a proper consideration of the statistics leaves no way for a prima facie case to have been proven at

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[9] This court previously employed a standard deviation analysis on employment statistics in *EEOC* v. *United Virginia Bank/Seaboard National*, 615 F2d 147 (4th Cir. 1980). In that case, which concerned a competitor of the defendant here, this court found that the EEOC had failed to demonstrate a prima facie case of employment discrimination. *Id.* at 153. This conclusion was based on the fact that a standard deviation analysis of the bank's work force statistics did not support a prima facie case, even when supported by the other statistical comparisons which were also found wanting.

* The computations I have made derive from the statistical figures which appear in the district court's opinion. The principal difference between my computations and those of the district court is that I have computed a specific standard deviation rather than a range. In addition, I have computed the standard deviation for the Nansemond County/City of Suffolk combined

populations. Black employees make up 18.6% of the office/clerical work force in the combined region. Labor Market Information for Affirmative Action Programs: State of Virginia, 1970 Census Data, 187. Such a combined statistic is appropriate as Nansemond County merged into the City of Suffolk during the period under consideration.

STATIC EMPLOYMENT STANDARD DEVIATIONS
Office/Clerical Personnel

Suffolk

	% Black	Total	Standard Deviations		
Year	Employees	Employed	Suffolk	Nanse.	Comb.
1968	0.0	28	1.80	2.88	2.54
1969	0.0	18	1.45	2.29	2.04
1970	5.3	19	.72	1.81	1.49
1971	11.1	18	-.11	1.16	.82
1972	10.0	20	.04	1.34	.99
1973	4.8	21	.85	1.94	1.64
1974	0.0	18	1.45	2.29	2.04
1975	0.0	12	1.18	1.88	1.66

Portsmouth

	% Black	Total	Standard Deviations	
Year	Employees	Employed	Portsmouth	Norfolk SMSA*
1968	1.1	92	4.76	3.54
1969	0.9	108	5.16	3.94
1970	3.2	95	4.32	3.00
1971	4.9	103	4.08	2.63
1972	6.5	123	4.04	2.37
1973	5.9	118	4.14	2.52
1974	5.3	132	4.53	2.85
1975	9.3	108	3.08	1.38

* Norfolk SMSA includes Norfolk, Portsmouth, Virginia Beach, Chesapeake and Suffolk.

" As explained in footnote 6, small sample sizes require that a greater number of standard deviations be used in order to achieve the same precision. In the instant case, since the Suffolk statistics were within the *Castaneda* standard, it is unnecessary to consider the exact effect of the small sample size on precision, for that would only make the conclusion even more favorable to the defendant.

prima facie case proven by straight percentage comparisons, the district court then applied the *Castaneda-Hazelwood* analysis, considered the applicant flow data, and concluded that that analysis lent no support to allegations of discrimination. It concluded that such evidence neutralized the EEOC's statistical evidence. Had the district court done what it should have done and applied the *Castaneda-Hazelwood* analysis initially to the static work force statistics, and after that considered Portsmouth alone, that could have justified its finding of a prima facie case. Since it considered both Portsmouth and the Norfolk SMSA, and since it held the Norfolk SMSA "more reliable," 21 E.P.D. at 13,066, the finding of a prima facie case under standard statistical principles as well as following the teaching of *Castaneda-Hazelwood* would be doubtful at best. In the nearest year to the trial, 1975, the standard deviation was only 1.38; for the four years before that, it had not exceeded 2.58; and for the three years before that had not exceeded 3.81. In addition, the standard deviation analysis indicates for applicant flow figures for Portsmouth for the only year for which figures were available, a standard deviation of only 2.16, hardly a sufficient variation to be of statistical significance and dislodge the null hypothesis of chance. While it is arguable that a prima facie case has been statistically proven for Portsmouth, the district court's consideration of the matter under the wrong mathematical and legal standard at the very best would make necessary a remand rather than an outright reversal.

II. REBUTTAL EVIDENCE

After finding the establishment of a prima facie case of employment discrimination, both the district court and the panel majority considered whether further statistical evidence rebutted the prima facie case. Both courts first considered whether a standard deviation analysis of the defendant's static employment figures rebutted the prima facie case. The district court held that

it did, while the panel majority held that it did not. 652 F2d at 1197. As discussed in the first part of this dissent, such an analysis should have been completed both by the district court and by this court as part of the analysis of the prima facie case. If such an analysis had been done properly, it would have shown that there was no prima facie case.

Assuming, arguendo, that the EEOC had established a prima facie case, it would be possible for the employer to rebut that evidence with evidence of hiring patterns since passage of Title VII. The Supreme Court has explained this process:

> The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.

Teamsters, 431 U. S. at 360 (footnote omitted); see *Hazelwood*, 433 U. S. at 309-10.

In the present case, the district court found that the evidence of the defendant's hiring practices since passage of Title VII (i.e. the applicant flow data) provided further rebuttal of the prima facie case. The district court first looked at the percentage of black employees hired by the defendant compared to the percentage of blacks among job applicants.[10] The court concluded that these

[10] There apparently was some question at trial as to whether the applicant flow data actually represented the complete number of applications received by the appellant. The district court was satisfied, however, that the information was sufficiently complete in order to accord it probative weight. I am unwilling to reach the same conclusion as did the panel majority, that the data was, in fact, unreliable. Its finding that the district court's holding was clearly erroneous I think is simply not supported by the record and is a clear violation of FRCP 52(a).

straight percentage comparisons as well as the small number of hiring decisions rebutted the allegations that the defendant had engaged in a practice of discrimination. As discussed in the first part of this dissent, such a straight percentage comparison is statistically meaningless without a standard deviation analysis. The district court completed a standard deviation analysis, but compared the defendant's hiring to the percentage of black employees in the regional work force rather than to the percentage of blacks in the applicant pool. Such a comparison is statistically valid, although a comparison to the applicant pool is preferable. Connolly & Peterson, *supra* at 83-86.[11] In any case, the analysis confirmed the district court's conclusion that the defendant's hiring practices did not evidence discrimination.

The appeals court disagreed as to whether the applicant flow data rebutted the prima facie case. The panel majority first concluded that there were sufficient hiring decisions on which to base a decision concerning hiring practices for office/clerical employees. 652 F2d at 1194. The court then turned to the meaning of the data, and, after expressing doubts as to the dependability of the data, concluded that it did not rebut the prima facie case. *Id.* at 1197. The panel majority rejected the district court's standard deviation analysis because it was based on the percentage of black employees in the work force rather than in the applicant pool. *Id.* at 1197 n. 17. The panel majority termed this comparison "manifestly incorrect," concluding, "Therefore, the district court's particular use of standard deviation analysis was without legal or factual basis, and we disregard it entirely."

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[11] The district court felt that *Castaneda* and *Hazelwood* mandated that standard deviation comparisons be made with the percentage of blacks in the work force rather than the applicant pool. I must agree with the panel majority that there is nothing in either opinion to so require. 652 F2d at 1197 n. 17. Nevertheless, I affirmatively disagree with the panel majority's conclusion that there is no legal or factual basis for the district court's comparison. See *Id.* The district court's comparison is perfectly valid and would be especially appropriate if information on the racial composition of the applicant pool was unavailable. See Connolly & Peterson, *supra* at 83-84.

Id. The court declined to do a standard deviation analysis of the applicant flow figures, saying:

> "Because of the demonstrated unreliability of these figures there is no need to attempt a correct reanalysis of the statistical significance of these disparities." *Id.*

The statement quoted just above is diametrically opposite to a statement in the text accompanying the above quote. There the panel majority said:

> The Suffolk samples for each year are concededly small, but the overall results simply confirm rather than dispel the prima facie case based upon the static work force statistics: over these years, during which blacks made up 24.8% of the qualified applicant pool, only 14.2% of those hired in these categories were black. In Portsmouth the limited data for 1975. . .not only fails to dispel the prima facie case but reinforces it.

Id. at 1197. The panel is thus saying in the footnote that the statistics are too unreliable to accord any significance, but in the text it uses these very statistics to make the point that the employer did in fact practice racial discrimination.

I have completed the standard deviation analysis that the panel majority claimed was unnecessary. It shows the following:

APPLICANT FLOW FIGURES (Office & Clerical Only)

Suffolk

Year	% Black Applicants	% Black Hired	Std. Deviations
1969	24.1	20.0	.21
1970	13.0	0.0	.54
1971	25.3	50.0	-.80
1972	26.7	20.0	.34
1973	24.1	0.0	1.49
1974	36.1	14.3	1.20
1975	13.0	14.3	-.10
1969-75 Combined	24.8	14.2	1.45

Portsmouth

1975	23.1	4.3	2.16

These computations show to be without statistical foundation the panel's conclusion that the defendant's hiring statistics support an inference of racial discrimination. The panel found it significant that while the applicant pool for Suffolk over the seven year period was 24.8% black, there were only 14.2% black hires. It turns out, however, that this amounts to a standard deviation of only 1.45, well below the *Castaneda* standard of two or three. The difference between actual and expected hiring in Portsmouth for the one available year also does not exceed the *Castaneda* standard.

III

I will consider separately the majority's remarkable statement concerning the legal significance and interpretation of standard deviation computations. While the majority made the statement in the context of rebuttal evidence of a prima facie case, the statement necessarily affects the use of all statistical evidence. The majority said:

> [A]uthority can be found for the proposition that most social scientists, applying laboratory rigor to rule out chance as even a theoretical possibility rather than the law's rougher gauge of the 'preponderance of the evidence,' are prepared to discard chance as a hypothesis when its probability level is no more than 5%, *i.e.*, at approximately two standard deviations. [W. Hays & R. Winkler, Statistics: Probability, Inference and Decision. 394 (1st. ed. 1971)] . . . [W]e conclude that courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three.

652 F2d at 1192. In the present case, the panel majority thus would not consider the applicant flow evidence as a rebuttal to the prima facie case because some of it is beyond one standard deviation.

Try as I may, I have been unable to find any support for the majority's conclusions (1) that law should be treated differently than other disciplines using statistical information and (2) that there is something suspect about the range of one to three standard deviations.

The majority has erred in equating the statistical significance of evidence solely to the legal concept of preponderance. The latter addresses the relative weight of the evidence introduced by the parties. The significance level goes primarily to the probative value of the evidence, and only incidentally to its weight. There is no basis for finding that some undisclosed significance level other

than 95 or 99% is appropriate for the law.[12] Numerous disciplines use such a standard. See, e.g., R. Beals, Statistics for Economists, 190-91 (1972); M. Hagood, Statistics for Sociologists, 447 (1941); Hammond & Householder, *supra* at 298 (psychology); J. Roscoe, Fundamental Research Statistics for the Behavioral Sciences, 182 (2d ed. 1975). Connolly & Peterson, in their treatise on statistics in employment discrimination litigation, discuss the meaning of 95% and higher significance levels in such litigation but make no mention of an appropriate level lower than 95%. See Connolly & Peterson, *supra* at 80 & n.69. There is simply no basis in law or mathematics I can find for the panel majority's statement.

The panel majority has raised an interesting issue, though, as to the meaning of statistics that differ by less than two or three standard deviations. As explained in the first part of this dissent, when two statistics differ by more than two or three standard deviations, a statistician would reject the hypothesis that the difference between actual and expected values is due to chance. A valid question is whether the statistician would accept the hypothesis that the difference is due to chance when the statistics differ by less than two or three standard deviations. The panel majority answers this by saying that courts should be "extremely cautious in drawing any conclusions from standard deviations in the range of one to three." 652 F2d at 1192. I have been unable to find anywhere authority for the statement that sets apart one to three standard deviations as a zone for special treatment. Rather, the authorities state that while you "accept" a hypothesis that is not rejected, this is a term of art and, while not ordinarily, may be permissibly, considered proof that the difference is due only to chance. See Mosteller, Rourke & Thomas, *supra* at 305-08; Roscoe, *supra* at 172.

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[12] The Hays and Winkler text citation that the court gives in its opinion does not support an assertion that statistics in law should be treated differently than in other disciplines. It supports only the proposition that statisticians usually employ either 1% or 5% significance levels.

Because there is no firm mathematical authority on the subject, the decision whether to accept rebuttal evidence which shows that the employer's hiring differs by less than two or three standard deviations from the expected hiring becomes subjective. To absolutely reject such evidence works an unfair hardship on any litigant in rebutting inferences raised by statistical evidence, not to mention any litigant depending on statistical evidence. Because of the importance of an employer's hiring practices in Title VII suits such as the instant one, I am inclined to encourage the admission of properly constructed statistical evidence of such practices. See *United Virginia Bank*, 615 F2d at 154. A court should be mindful that evidence showing a difference of less than two or three standard deviations is not necessarily conclusive that the employer did not practice discrimination; but it is evidence, and, absent any authoritative statement that it is meaningless, I object to its in effect flat rejection by the majority. Indeed, the mathematicians are agreed that unless a standard deviation analysis discloses a variation of more than two or three standard deviations, a prima facie statistical case of discrimination has not been proved. Accord *Hazelwood*, 433 U. S. at 309 n. 14.[11] Thus, the majority's effective rejection of all statistical evidence between one and three standard deviations is in flat contradiction of the teaching of *Hazelwood* that more than two or three standard deviations deserves credence.

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[11] I do not think the Supreme Court's recitation, in note 17 of *Hazelwood*, that its statistical analysis in that note suggests that precise calculations of statistical significance are necessary in employment of statistical proof is an indication that the use of hypothesis testing is unnecessary in a case, as here, in which the sole evidence of a prima facie case of discrimination is statistical.

IV.

Much of this dissent employs terms and propositions less than familiar to many. In order that there be no mistake as to the gist of my thinking, it is as follows.

If statistics are used as evidence in cases such as this, they must be used in accordance with correct statistical principles in order to have any rational meaning at all.

The district court and the majority of the panel have used statistical principles in the establishment of plaintiff's prima facie case which are contrary to every mathematical authority on the subject.

If that were not enough, the majority then rejects standard hypothesis testing, again contrary to all the mathematical authorities.[11]

This decision expressly holds that a plaintiff's prima facie case is properly established by the use of incorrect statistical principles, but that correct statistical principles may not be employed by a defendant either to undo the prima facie case or in rebuttal.

I think such a holding not only offends reason, it is contrary to law and notions of common justice.

CONCLUSION

I have sought in this dissent to emphasize the methodology for interpretation of statistics. Unless this court commences to follow valid statistical procedures, it will continue, as here, to draw inferences which are unwarranted. The result is bad law which may only confuse future litigants, not to mention the courts in this circuit.

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[11] The opinion is plainly contrary to the teaching of *Castaneda*, *Hazelwood* and *Mayor* v. *Educational Equality League*, which cases acknowledged and properly used mathematical statistical principles.

APPENDIX D

42 U.S.C. §§ 2000e-2(a) (1), (2);
42 U.S.C. §§ 2000e-5(f) (1)

42 U.S.C. §§ 2000e-2(a)(1), (2)

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §§ 2000e-5(f)(1)

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has

not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.